TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

[redacted]

No. 564.

[redacted]

[redacted] ERROR,

vs.

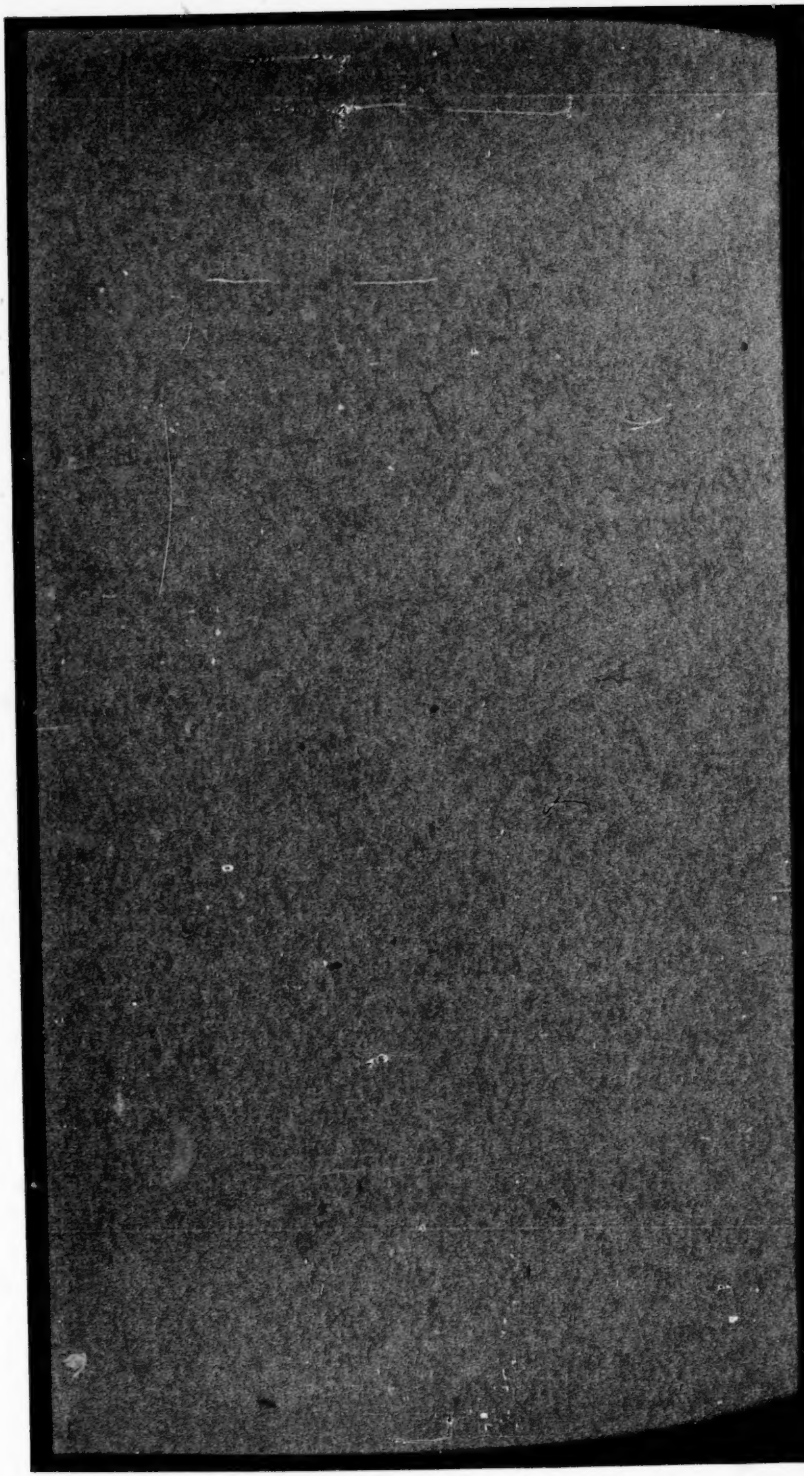
THE STATE OF VERMONT, BY CLARKE C. FITT[redacted] ATTORNEY GENERAL.

[redacted]

[redacted]

[redacted]

(20,767.)



(20,767.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 364.

CONSOLIDATED RENDERING COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF VERMONT, BY CLARKE C. FITTS, ATTORNEY GENERAL.

IN ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

INDEX.

	Original.	Print.
Writ of error	*a*	1
Return on writ of error	*b*	2
Record from Chittenden county court	1	2
Respondent's exceptions	1	2
Notice to produce books, &c	2	3
Report to court by grand jury	5	4
Statement of transactions	8	7
Petition of attorney general	12	10
Order to show cause	16	12
Motion to dismiss	21	16
Affidavit of Freedom Hutchinson	22	17
Answer of Consolidated Rendering Co	23	17
Replication	24	18
Ruling of the court	25	18
Petition for writ of certiorari	28	21
Petition for writ of error	34	25
Assignment of errors	34	25
Opinion	36	26
Assignment of errors	65	42
Citation and service	69	44
Clerk's certificate	72	44

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 4, 1907.

a UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Judges of the Supreme Court of the State of Vermont, holden at Montpelier, within and for the County of Washington, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the State of Vermont in which a decision could be had in the suit between the State of Vermont by Clarke C. Fitts, Attorney General, Plaintiff and Consolidated Rendering Company, Defendant, in a petition to adjudge said Consolidated Rendering Company in contempt of court, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity, or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under, the United States, and the decision was against the title, right, privilege, or exemption, specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Consolidated Rendering Company as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Melville W. Fuller, Chief Justice of the United States, the fourteenth day of June in the year of our Lord, one thousand nine hundred and seven.

[Seal Circuit Court, District of Vermont, U. S. A.]

GEO. E. JOHNSON,
Clerk of the Circuit Court of the United States,
District of Vermont.

Allowed by
JOHN W. ROWELL,
Chief Judge of the Supreme Court
of the State of Vermont.

b STATE OF VERMONT, *Chittenden County, ss:*

And now, here, the Judges of the Supreme Court of the State of Vermont make return of this writ by annexing hereto and sending herewith, under the seal of the said Supreme Court, a true and attested copy of the record and proceedings in the suit within mentioned, with all things concerning the same, to the Supreme Court of the United States, as within commanded.

In Testimony Whereof, I C. J. Russell Clerk of said Supreme Court have hereto set my hand and the seal of said Court this 15th day of June A. D. 1907.

[Seal Supreme Court, State of Vermont.]

C. J. RUSSELL, *Clerk.*

1 Chittenden County Court, September Term, 1906.

In re PETITION FOR CONTEMPT
vs.
CONSOLIDATED RENDERING COMPANY.

Respondent's Exceptions.

This was a petition of the Attorney General, pursuant to Number 75 of the Acts of the General Assembly of 1906, praying that the respondent company be cited before the Court to show cause why it should not be adjudged in contempt of court for failure to produce before the Grand Jury of Chittenden County certain papers and documents in accordance with a notice to produce served upon said company on the tenth day of October, 1906, in accordance with and pursuant to the provisions of said Act Number 75 of the General Assembly of 1906. Notice of this proceeding was duly served upon the respondent company, and it appeared in court by its attorneys and filed its motion to dismiss these proceedings for the reasons following:

1. Because the memoranda and papers called for are not legally material or competent evidence in the investigation pending before said Grand Jury.

2. Because it is sought to compel said Rendering Company to bring into the State of Vermont for use before said Grand Jury papers and memoranda which will tend to criminate said Rendering Company and render it liable to criminal prosecution in this state.

3. Because the statute pursuant to which said notice to produce was given, and pursuant to which these proceedings were instituted, is void and inoperative because it is in contravention of the 4th, 5th and 14th Amendments of the Constitution of the United States, and in contravention of the 10th and 11th Articles of the Constitution of the State of Vermont.

2 Said company also filed its answer to the allegations of the petition of the Attorney General, which was traversed. The Court overruled the respondent company's motion to dismiss, to which ruling the respondent seasonably excepted.

Upon trial of the cause the Court adjudged the respondent guilty of contempt and imposed a fine of three thousand dollars, for the collection of which execution was ordered to issue. The original notice to produce served upon said company October tenth, 1906, the report of the Grand Jury, the petition of the Attorney General and the respondent's answer and the traverse are made a part of these exceptions.

Exceptions allowed, and cause passed to the Supreme Court.

JOHN W. ROWELL,
Presiding Judge.

STATE OF VERMONT, *Chittenden County, ss:*

To the Consolidated Rendering Company, a corporation organized under the laws of the State of Maine, and doing business at Burlington, in said County of Chittenden, under the name and style of the Burlington Rendering Company:

By the authority of the State of Vermont; you are hereby notified to produce before the Grand Jury of the said County of Chittenden, at the Court House, in Burlington, in said County of Chittenden, on the (17th) seventeenth day of October, 1906, at 10 o'clock in the forenoon, the following books, papers, correspondence, accounts, data and memoranda, to wit:

All the books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements at any time made or kept or had by your Company at said Burlington, which contain any account with, statement of or relating to or concerning any deal or business with any of the following parties, since January 1st, 1904,—Dr. F. A. Rich, of Burlington, Vermont; Victor I. Spear, of Randolph, Vermont;
3 Dr. George Stephens of Hartford, Vermont; George H. Terrill, of Morristown, Vermont, or the Cattle Commissioners of the State of Vermont, or the State of Vermont; also all books, vouchers and receipts issued by your Company or by any officer or employé of your Company, at said Burlington, since January 1, 1904, to any of the above named parties; also all statements, correspondence, data, memoranda, books, vouchers and receipts made or kept at said Burlington, which relate to the payment by your company to any of the above parties on the following dates and for the amounts specified opposite each date.

1905.

Jan.	4.....	$15.56	Nov.	8.....	$85.74
		358.94		13.....	135.37
	20.....	242.94		24.....	138.82
	26.....	127.32	Dec.	1.....	23.44
	31.....	8.03		2.....	51.43
Feb.	4.....	47.13		4.....	376.35
	6.....	219.49		4.....	424.90
Jan.	30.....	12.84		12.....	161.43
Feb.	11.....	113.62		21.....	140.90

	27	$35.00		23		$339.74
May	2	22.24		26		168.53
	2	206.56		30		17.55
June	12	49.00	1906.			41.93
May	6	17.64				225.04
Sep.	16	87.74				104.98
Oct.	26	89.04				130.54
Feb.	9	54.52	Jan.	27		69.57
	12	34.03				121.87
	12	46.85				4.68
	17	119.13	July	6		6.88
	17	115.68	Aug.	23		107.41
	27	42.14		17		4.51
Mar.	6	6.30		28		15.59
	21	9.35				
	30	17.11				
4 Apr.	3	35.53				
	26	45.43				
May	1	262.12				
	11	56.17				
	15	160.67				
	21	44.78				
	25	41.15				
June	1	86.96				
	18	61.07				
	14	58.93				
	27	6.45				
	29	10.01				

All the foregoing to be used as may be legally admissible as evidence before said Grand Jury, relative to the matter of complaint pending, and then and there to be investigated by said Grand Jury, in which the said above named F. A. Rich, Victor I. Spear, George Stephens and G. H. Terrill are charged with having unlawfully sold diseased meat for food purposes, at said Burlington.

This you will not omit, but will answer your default under the pains and penalties of the law in such case made and provided. To any Sheriff or Constable in the State to serve and return.

Done by order of the County Court for the County of Chittenden.

Dated at Burlington, in said County, this (10th) tenth day of October, 1906.

C. J. RUSSELL,
Clerk of the Chittenden County Court.

5 STATE OF VERMONT, *Chittenden County, ss:*

Chittenden County Court, September Term, 1906.

The Grand Jury, within and for said County of Chittenden, summoned and serving at said Term of Court,

Now here in Court, on their oaths, respectfully represent:—

That the Consolidated Rendering Company, a corporation organ-

ized under the laws of the State of Maine and doing business in said County of Chittenden, under the name of the Burlington Rendering Company, was, on the 10th day of October, 1906, duly served with notice, as the law provides, to produce before the Grand Jury of the County of Chittenden, at the Court House in Burlington in said County, on the 17th day of October, 1906, at ten o'clock in the forenoon, the following books, papers, correspondence, data, and memoranda, to wit:

"All the books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements, at any time made or kept by your Company at said Burlington, which contain any account with, statement of, or relating to or concerning any deal or business with any of the following parties since January 1st, 1904,—Dr. F. A. Rich, of Burlington, Vermont; Victor I. Spear, of Randolph, Vermont, Dr. George Stephens, of Hartford, Vermont; George H. Terrill, of Morristown, Vermont, or the Cattle Commission of the State of Vermont, or the State of Vermont; also all books, vouchers and receipts issued by said Company or by any officer or employee of your Company, at said Burlington, since January 1st, 1904, to any of the above named parties; also all statements, correspondence, data, memoranda, books, vouchers and receipts made or kept at said Burlington, which relate to the payment by your Company to any of the above parties on the following dates and for the amounts specified opposite each date:

1905.

	Jan.	4.....	$15.56	Nov.	8.....	$85.74
			358.94		13.....	135.37
		20.....	242.94		24.....	138.82
		26.....	127.32	Dec.	1.....	23.44
		31.....	8.03		2.....	51.43
6	Feb.	4.....	47.13	Dec.	4.....	376.35
		6.....	219.49		4.....	424.90
	Jan.	30.....	12.84		12.....	161.43
	Feb.	11.....	113.62		21.....	140.90
		27.....	35.00		25.....	339.74
	May	2.....	22.24		26.....	168.53
		2.....	206.56		30.....	17.55
	June	12.....	49.00			41.93
	May	6.....	17.64			225.04
	Sept.	16.....	87.74			104.98
	Oct.	26.....	89.04			130.54
	Feb.	9.....	54.52	Jan.	27.....	69.57
		12.....	39.03			121.67
		12.....	46.85			4.68
		7.....	119.13	July	6.....	6.88
		7.....	115.68	Aug.	23.....	107.41
		27.....	42.14		17.....	4.51
	Mar.	6.....	6.30		28.....	15.59
		21.....	9.35		*	

	30.....	$17.11	Apr.	3.....	$35.53
Apr.	26.....	45.43	May	1.....	262.12
	11.....	56.67		21.....	44.78
	25.....	41.15	June	1.....	86.96
June	18.....	61.07		14.....	58.93
	27.....	6.45		29.....	10.01

All the foregoing to be used as may be legally admissible as evidence before said Grand Jury, relative to the matter of complaint pending, and then and there to be investigated by said Grand Jury, in which the said above-named F. A. Rich, Victor I. Spear, George Stephens and G. H. Terrill, are charged with having unlawfully sold diseased meat for food purposes, at said Burlington."

That on said October 17th, 1906, said Rendering Company did produce before said Grand Jury, certain books, of account, containing accounts, data, memoranda, covering and concerning deals with certain of the parties named in said notice, and did produce all but two (2) of the cheeques paid by said Company to the said
7 F. A. Rich, of dates and amounts specified in said notice, but have produced nothing further in response to said notice:

That it has appeared from the evidence before said Grand Jury that the said F. A. Rich, as one of the Cattle Commission of the State of Vermont, has sold and disposed of to the said Rendering Company, a large number of carcasses and hides of cattle condemned by said Cattle Commission of the State of Vermont under the law, since January 1st, 1904:

That a portion of said carcasses have been sold for the purposes and with the expectation that the same were to be used for food purposes; and a portion of the same for the purpose of being rendered into fertilizer:

That the said Rendering Company, by its employees at its plant in said Burlington, has kept an accurate and minute account of all the carcasses and hides so sold and disposed of to it by said Rich and said Cattle Commission keeping an account of such carcasses taken and used for food purposes, and the carcasses taken and used for rendering into fertilizer, and of the hides, on slips, memoranda, or data—similar in character to the three (3) slips of memoranda attached to Exhibit 2, Carl E. Nay Testimony, which is attached to and made a part of this representation and that with each transaction there has been made in duplicate by the employees of said Rendering Company, a statement or account—similar in character to the first sheet of Exhibit 2; that the said memoranda and statement for each transaction so had, since January 1st, 1904, to July 1st, 1906, have been filed, together with the check given in payment of the amount shown by the statement, in the files of said Company at said Burlington, and have remained there in said Burlington until about the time that the investigation of the deal between the said Cattle Commission and the said Rendering Company was commenced by the State's Attorney of Chittenden County; and that all of said statements, memoranda, checks, and said books of accounts covering the period from January 1, 1904, to July 1, 1906 were removed from the

State of Vermont by the said Company or its agents or servants about the time last mentioned:

It further appears that there have been, from January 1st, 1904, to July 1st, 1906, transactions between said Rich, acting for and in behalf of the said Cattle Commission for the State of Vermont, with said Company at the dates and of the character to the amounts indicated in three (3) sheets attached hereto, headed "Dr. Rich's Transactions":—

8 The Column thereof headed "S. H."—meaning, as the testimony shows, the amount paid for cattle at that date purchased and taken by said Company from said Dr. Rich and the Cattle Commission, aforesaid, for food purposes;

The Column headed "T. & G."—meaning amount paid for cattle so purchased at the date named by the Rendering Company, for the purpose of rendering into fertilizer;

The Column headed "H. & S."—meaning the amount paid for hides of the cattle so purchased on the dates so named.

The said Grand Jury further represents that the books and checks produced by the said Rendering Company in response to the aforesaid notice, show nothing more than appears on the said sheet of Dr. Rich's Transactions; that the statements of each transaction and memoranda relating thereto as filed and kept by the said Rendering Company, as hereinbefore stated, are necessary and important as evidence bearing upon the matter under investigation by the Grand Jury, as recited in the said notice to produce.

Wherefore, the Grand Jury, aforesaid, present these facts to the Court, for such action in the premises as to the Court shall seem meet.

Dated at Burlington in said County and State, this 19th day of October, 1906.

S. M. ASHERTON, *Foreman.*

Burlington Rendering Co.

BURLINGTON, *Sept.* 29.

Dr. F. A. Rich:

Enclosed find check for $—— in payment for your shipment of 3014 which we have graded as follows:

11 Hides, 515 lbs. at 11½c	$59.22
10 Carcasses, 3,213 lbs. at ¼c	8.03
1 " 380 " at 2c	7.60
	$74.85
Slaughtering	5.50
	$69.35

9 From State of Vermont.

Address, Dr. Rich.

SEPT. 26, 1906.

11 Hides, paid weight 515, price 11½c..... $59.22
4 Horse Hides, grade 50, est. sold weight 212 lbs.
7 Horse Hides, grade 40, est. sold weight 303 lbs.

From State of Vermont.

SEPT. 25, 1906.

2 Beef Carcass	.....	$7.10
3 " "	.....	9.20
3 " "	.....	8.40
2 " "	.....	7.42
		$32.12

10

ADAMS,
Receiving Clerk.

From State of Vermont.

SEPT. 25, 1906.

1 Carcass, 380 good.

W. S. HEATH,
Receiving Clerk,
Per C. E. NAY.

Dr. Rich's Transactions:

Date.	Voucher.	S. H.	T. & G.	H. & S.	Total.
1904.					
Jan. 4.....	9711	.....	$18.59	.....	$18.59
11.....	9777	.....	12.19	.....	12.19
Feb. 29.....	362	.....	16.89	.....	16.89
Nov. 21.....	4223	.....	49.00	.....	49.00
Dec. 5.....	4493	.....	21.50	.....	21.50
10					
1905.					
Jan. 4.....	4993	$214.62	.....	$144.32	$358.94
4.....	4973	15.56	.....	.....	15.56
20.....	5148	152.30	90.64	.....	242.94
27.....	5221	172.80	.60	53.92	127.32
30.....	5353	4.50	.74	7.60	12.84
31.....	5380	.....	1.75	7.28	8.03
Feb. 6.....	5450	120.52	4.85	114.12	219.49
7.....	5470	4.36	.46	.....	4.82
9.....	5475	25.52	.65	20.96	47.13
11.....	5494	65.86	.....	47.76	113.62
15.....	5521	.....	.61	2.48	3.09
27.....	5751	10.20	.....	6.24	16.44
Apr. 4.....	6249	113.46	6.79	119.36	239.61
13.....	6377	123.22	1.58	81.76	206.56
13.....	6378	135.47	2.11	96.87	191.45

Date.		Voucher.	S. H.	T. & G.	H. & S.	Total.
May	26	6908	$71.36	.77	$58.65	$130.78
July	1	7623	.....	.....	8.64	8.64
*	8	.....	*	*	*	3.50
Sept.	16	8405	19.80	3.09	64.85	87.74
	27	8481	.....	.....	6.80	6.80
Oct.	26	8782	46.68	1.03	41.33	89.04
	31	8906	140.34	2.20	138.06	280.60
Nov.	8	8957	.....	.69	40.31	85.74
	13	9001	68.66	.....	.92	135.37
	24	9071	56.70	4.40	77.72	138.82
Dec.	1	9157	9.47	.....	13.79	23.44
	2	9182	28.44	.....	22.99	51.33
	4	9277	153.50	4.28	218.57	376.35
	11	9369	179.63	.....	345.39	424.90
	12	9381	73.10	.....	83.33	161.43
	21	9510	91.14	.....	79.76	140.90
	23	9519	141.15	.....	198.59	339.74
	26	9538	86.27	.....	82.26	168.53
	30	9578	8.20	.....	9.35	17.55
11						
1906.						
Jan.	15	9865	54.31	.....	76.23	130.54
	18	9888,	30.12	.....	78.86	104.98
	19	9905	23.98	.....	17.95	41.93
	19	9906	91.38	.....	133.66	225.04
	27	9987	.28	.....	4.40	4.68
	27	9988	47.60	.....	74.18	121.78
	27	9989	29.17	.....	40.40	69.57
Feb.	9	221	21.76	.....	32.76	54.52
	12	236	18.36	.....	15.67	34.03
	12	237	28.83	.....	28.02	46.85
	17	279	59.92	.....	59.76	115.68
	17	280	64.89	.....	54.24	119.13
	27	359	22.19	.....	19.95	42.14
Mar.	6	531	6.30	.....	.....	6.30
	21	672	5.30	.....	4.05	9.35
	31	673	9.82	.....	7.29	17.11
Apr.	31	850	16.84	.....	18.69	35.53
	26	1138	31.26	1.35	12.82	45.43
May	1	1271	103.68	.....	158.44	262.12
	11	1385	28.04	.....	28.13	56.17
	11	1385	71.74	.....	28.13	5.00
	15	1410	71.74	.....	88.93	160.67
	21	1487	26.30	.....	18.48	44.78
	25	1512	22.78	.....	18.37	41.15
June	1	1586	36.56	.....	50.40	86.96
	9	1793	19.35	.....	39.58	58.93
	18	1824	26.32	.....	34.75	61.07
	27	1905	.....	.99	5.46	6.45
	29	1927	5.60	.....	4.41	10.01

12 To the Honorable County Court for the County of Chittenden, in session:

Comes Clarke C. Fitts, Attorney-General of the State of Vermont, and respectfully represents,—

That the Consolidated Rendering Company, a corporation organized under the laws of the State of Maine and doing business in said County of Chittenden, under the name of the Burlington Rendering Company, was, on the 10th day of October, 1906, duly served with notice, as the law provides, to produce before the Grand Jury of the County of Chittenden, at the Court House in Burlington in said County, on the 17th day of October, 1906, at ten o'clock in the forenoon, the following books, papers, correspondence, data, and memoranda, to wit:

"All the books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements, at any time made or kept or had by your Company at said Burlington, which contain any account with, statement of or relating to or concerning any deal or business with any of the following parties, since January 1st, 1904,—Dr. F. A. Rich of Burlington, Vermont; Victor I. Spear, of Randolph, Vermont; Dr. George Stephens, of Hartford, Vermont; George H. Terrill, of Morristown, Vermont, or the Cattle Commission of the State of Vermont, or the State of Vermont; also all books, vouchers and receipts issued by your Company or by any officer or employee of your Company, at said Burlington, since January 1st, 1904, to any of the above-named parties; also all statements, correspondence, data, memoranda, books, vouchers and receipts made or kept at said Burlington, which relate to the payment by your Company to any of the above parties on the following dates and for the amounts specified opposite each date:

	1905					
	Jan.	4.....	$15.56	Nov.	8.....	$85.74
			358.94		13.....	135.37
		20.....	242.94		24.....	138.82
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13	Jan.	30.....	12.84	Dec.	12.....	161.43
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	May	2.....	22.24		26.....	168.53
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		12.....	46.85			4.68

	7.....	$119.13	July	6.....	$6.88
	7.....	115.68	Aug.	23.....	107.41
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	11.....	56.67		21.....	44.78
	25.....	41.15	June	1.....	86.96
June	18.....	61.07		14.....	58.93
	27.....	6.45		29.....	10.01

All the foregoing to be used as may be legally admissible as evidence before said Grand Jury, relative to the matter of complaint pending, and then and there to be investigated by said Grand Jury, in which the said above-named F. A. Rich, Victor I. Spear, George Stephens, and G. H. Terrill, are charged with having unlawfully sold diseased meat for food purpases, at said Burlington."

That on said October 17th, 1906, said Rendering Company did produce before said Grand Jury, certain books of account, containing accounts, data, memoranda, covering and concerning deals with certain of the parties named in said notice, and did produce
14 all but two (2) of the checques paid by said Company to the said F. A. Rich, of dates and amounts specified in said notice, but have produced nothing further in response to said notice:

That it has appeared from the evidence before said Grand Jury that the said F. A. Rich, as one of the Cattle Commission of the State of Vermont, has sold and disposed of to the said Rendering Company, a large number of carcasses and hides of cattle condemned by said Cattle Commission of the State of Vermont under the law, since January 1st, 1904:

That a portion of said carcasses have been sold for the purposes and with the expectation that the same were to be used for food purposes; and a portion of the same for the purpose of being rendered into fertilizer:

That the said Rendering Company, by its employees at its plant in said Burlington, has kept an accurate and minute account of all the carcasses and hides so sold and disposed of to it by said Rich and said Cattle Commission—keeping account of such carcasses as were taken and used for food purposes, and the carcasses taken and used for rendering into fertilizer, and of the hides, on slips memoranda, or data—similar in character to the three (3) slips of memoranda attached to Exhibit 2, Carl E. Nay Testimony, which is attached to and made a part of this petition; and that with each transaction there has been made in duplicate by the employees of said Rendering Company, a statement or account—similar in character to the first sheet of Exhibit 2; that the said memoranda and statement for each transaction so had, since January 1st, 1904, to July 1st, 1906, have been filed, together with the check given in payment of the amount shown by the statement, in the files in the

office of said Company at said Burlington, and have remained there in said Burlington until about the time that the investigation of the deal between the said Cattle Commission and the said Rendering Company was commenced by the State's Attorney of Chittenden County; and that all of said statements, memoranda, checks, and said books of account were removed from the State of Vermont by the said company or its agents or servants about the time last mentioned:

It further appears that there have been, from January 1st, 1904, to July 1st, 1906, transactions between the said Rich, acting for and in behalf of the said Cattle Commission for the State of Vermont, with said company at the dates and of the character and to the amounts indicated in the three (3) sheets attached hereto, headed "Dr. Rich's Transaction."—

15 The Column thereof headed "S. H."—meaning as the testimony shows, the amount paid for cattle at that date purchased and taken by said Company from said Dr. Rich and the Cattle Commission, aforesaid, for food purposes;

The Column headed "T. & G."—meaning, amount paid for cattle so purchased at the date named by the Rendering Company, for the purpose of rendering into fertilizer;

The Column headed "H. & S."—meaning the amount paid for hides of the cattle so purchased on the dates so named.

Your petitioner represents that the books and checks produced by the said Rendering — in response to the aforesaid notice, show nothing more than appears on said sheets of Dr. Rich's transactions.

That the statements of each transaction and the memoranda relating thereto as filed and kept by the Rendering Company, as hereinbefore stated, are necessary and important as evidence bearing upon the matter under investigation by said Grand Jury, as recited in said notice to produce:

Wherefore, Your petitioner prays that this Honorable Court may summon the said Consolidated Rendering Company before it, to be dealt with in the premises as for contempt, as the law provides, for neglect and failure to produce said statements, data and memoranda, as required by said notice.

Dated at Burlington in said County, this 19th day of October, 1906.

CLARKE C. FITTS,
Attorney-General of the State of Vermont.

16 STATE OF VERMONT, *County of Chittenden, ss:*

Chittenden County Court, September Term, 1906.

To the Consolidated Rendering Company, a corporation organized under the Laws of the State of Maine, doing business at Burlington in the County of Chittenden and State of Vermont under the name and style of the Burlington Rendering Company:

Whereas, there was issued by this Court on October 10th, 1906, an order and notice requiring the Consolidated Rendering Company, a corporation organized under the laws of the State of Maine and doing business at Burlington in said County, under the name and style of the Burlington Rendering Company, to produce before the

Grand Jury of said County of Chittenden, at the Court House in Burlington in said County, on the 17th day of October, 1906, at ten o'clock in the forenoon, the following books, papers, correspondence, data and memoranda, to wit:

"All the books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements, at any time made or kept or had by said Company at said Burlington, which contain any account with, statement of or relating to or concerning any deal or business with any of the following-named parties, since January 1st, 1904,—Dr. F. A. Rich, of Burlington, Vermont; Victor I. Spear, of Randolph, Vermont; Dr. George H. Stephens, of Hartford, Vermont; George H. Terrill, of Morristown, Vermont, or the Cattle Commission of the State of Vermont, or the State of Vermont; also all books, vouchers and receipts issued by said Company or any officer or employee of said Company, at said Burlington, since January 1st, 1904,
17 to any of the above-named parties; also all statements, correspondence, data, memoranda, books, vouchers and receipts made or kept at said Burlington, which relate to the payment by said Company to any of the above-parties on the following dates and for the amounts specified opposite each date:

1904					
Jan.	20	$15.56	Nov.	8	$85.74
		358.94		13	135.37
	20	242.94		24	138.82
	26	127.32	Dec.	1	23.44
	31	8.03		2	51.53
Feb.	4	47.13		4	376.35
	6	219.49		4	424.90
Jan.	30	12.84		12	161.43
Feb.	11	113.62		21	140.90
	27	35.00		25	339.74
May	2	22.24		26	168.53
	2	206.56		30	17.55
June	12	49.00			41.93
May	6	17.64			225.04
Sep.	16	87.74			104.98
Oct.	26	89.04			130.54
Feb.	9	54.52	Jan.	27	69.57
	12	39.03			121.67
	12	46.85			4.68
	7	119.13	July	6	106.88
	7	115.68	Aug.	23	107.41
	27	42.14		17	4.51
Mar.	6	6.30		28	15.59
	21	9.35	Mar.	30	17.11
Apr.	3	35.53	Apr.	26	45.43
May	1	262.12		11	56.67
	21	44.78		25	41.15
June	1	86.96	June	14	58.93
	18	61.07		29	10.01
	27	6.45			

18 All the foregoing to be used as may be legally admissible as evidence before said Grand Jury, relative to the matter of complaint, and then and there to be investigated by said Grand Jury, in which the said above-named F. A. Rich, Victor I. Spear, George Stephens, and G. H. Terrill, are charged with having unlawfully sold diseased meat for food purposes, at said Burlington."

Which Order and Notice was on the said date, as appears of record, duly served upon said Consolidated Rendering Company, in manner as the law provides.

And Whereas, the Grand Jury within and for the County of Chittenden, now here in Court, do represent to this Court:

That on said October 17th, 1906, said Rendering Company did produce before said Grand Jury, certain books of account, containing accounts, data, memoranda, covering and concerning deals with certain of the parties named in said notice, and did produce all but two (2) of the checques paid by said Company to the said F. A. Rich, of dates and amounts specified in said notice, but have produced nothing further in response to said notice:

That it has appeared from the evidence before said Grand Jury that the said F. A. Rich, as one of the Cattle Commission of the State of Vermont, has sold and disposed of to the said Rendering Company, a large number of carcasses and hides of cattle condemned by said Cattle Commission of the State of Vermont under the law, since January 1st, 1904:

That a portion of said carcasses ha*ve* been sold for the purposes and with the expectation that the same *were* to be used for food purposes; and a portion of the same for the purpose of being rendered into fertilizer:

That the said Rendering Company, by its employees at its plant in said Burlington, has kept an accurate and minute account of all the carcasses and hides so sold and disposed of to it by said Rich and said Cattle Commission—keeping an account of such carcasses taken and used for food purposes, and the carcasses taken and used for rendering into fertilizer, and of the hides, on slips, memoranda, or data—similar in character to the three (3) slips of memoranda attached to Exhibit 2, Carl E. Nay Testimony, which is attached to and made a part of this petition; that with each transactions there has been made in duplicate by the employees of said Rendering Company, a statement or account—similar in character to the

19 first sheet of Exhibit 2; that the said memoranda and statement for each transaction so had, since January 1st, 1904, to July 1st, 1906, have been filed, together with the checque given in payment of the amount shown by the statement, in the files of said Company at said Burlington, and have remained there in said Burlington until about the time that the investigation of the deal between the said Cattle Commission and the said Rendering Company was commenced by the State's Attorney of Chittenden County; and that all of said statements, memoranda, checks, and said books of accounts were removed from the State of Vermont by the said Company or its agents or servants about the time last mentioned.

It further appears that there have been, from January 1st, 1904, to July 1st, 1906, transactions between the said Rich, acting for and

in behalf of the said Cattle Commission for the State of Vermont, with said Company at the dates and of the character and to the amounts indicated in the three (3) sheets attached hereto, headed "Dr. Rich's Transactions."—

The Column thereof headed "S. H."—meaning, as the testimony shows, the amount paid for cattle at that date purchased and taken by said Company from said Dr. Rich and the Cattle Commission, aforesaid, for food purposes;

The Column headed "T. & G."—meaning, amount paid for cattle so purchased at the date named by the Rendering Company, for the purpose of rendering into fertilizer;

The Column headed "H. & S."—meaning the amount paid for hides of the cattle so purchased on the dates so named."

The said Grand Jury further represent that the books and checks produced by the said Rendering Company in response to the aforesaid notice, show nothing more than appears on the said sheet of Dr. Rich's Transaction; that the statements of each transactions and memoranda relating thereto as filed and kept by the said Rendering Company, as hereinbefore stated, are necessary and important as evidence bearing upon the matter under investigation by the Grand Jury, as recited in said notice to produce.

And Whereas, Clarke C. Fitts, Attorney-General of the State of Vermont, has presented to this Court his petition, setting forth the same facts as represented by the Grand Jury, as aforesaid, and thereupon praying that this Court summon the said Consolidated Rendering Company before it to be dealt with in the premises for contempt, as the law provides, for neglect and failure to produce said statements, data and memoranda, as required by said notice;

Now Therefore, upon consideration of the said representation of the Grand Jury, as aforesaid, and of the petition of the Attorney-General, as aforesaid,—

You, the Consolidated Rendering Company, are hereby notified to appear before this Court at the Court House in Burlington in the County of Chittenden and State of Vermont, on Tuesday, October 30th, 1906, at 11 o'clock, a. m., then and there to show cause, if any you have, why you should not be dealt with for contempt in the premises, as the law provides.

To any sheriff or constable in the State to serve and return.

Done by order of Court at said Burlington, this 19th day of October, 1906.

C. J. RUSSELL,
Clerk, Chittenden County Court.

STATE OF VERMONT, *Chittenden County, ss:*

At Burlington in said County this 22nd day of October, A. D. 1906.

I then made service of the within notice and order upon the within named corporation by delivering to L. E. Brigham as manager of its business within the State of Vermont and as the person in charge of its property within this State a true and attested copy thereof with this my doings hereon, thereon endorsed and at said

Burlington upon said date I then made further service of the within notice and order upon the within named corporation by delivering to John J. Enright as attorney of said corporation a like true and attested copy hereof with my doings hereon thereon endorsed and upon the 23rd day of October, 1906, at Montpelier in the County of Washington, I then made further service of the within notice and order upon the within named corporation by delivering to Frederick G. Fleetwood, Secretary of State duplicate copies thereof for said corporation with my doings thereon hereon endorsed.

Attest:

C. E. QUINN,
Deputy Sheriff.

Fees.

4 Copies	$8.00
48 Miles Travel	4.80
	$12.80

21 STATE OF VERMONT, *Chittenden, ss:*

In re PETITION FOR CONTEMPT
against
CONSOLIDATED RENDERING COMPANY.

Motion to Dismiss.

Now comes the Consolidated Rendering Company and moved this Honorable Court that the petition of the Attorney-General of the State of Vermont against said Company praying that it may be dealt with for contempt for neglect and failure to produce before the Grand Jury, certain data and memoranda, be dismissed and for the following reasons:

1st. Because the memoranda and papers called for are not legally material and competent evidence in the investigation being made by the Grand Jury.

2nd. Because it is sought by said petition to compel said Rendering Company to bring into the State of Vermont for use before said Grand Jury, papers and memoranda which may tend to criminate said Rendering Company and render it liable to criminal prosecution, and because said statute and the requirements thereof is in contravention of the 4th and 5th and 14th Amendments of the Constitution of the United States, and in contravention of the 10th and 11th Articles of the Constitution of the State of Vermont.

FREEDOM HUTCHINSON,
Boston, Mass.,
R. E. BROWN,
J. J. ENRIGHT,
Att'ys for Consolidated Rendering Co.

22 STATE OF VERMONT, *Chittenden, ss:*

In re PETITION FOR CONTEMPT
against
CONSOLIDATED RENDERING COMPANY.

Affidavit of Freedom Hutchinson in Behalf of Consolidated Rendering Co.

I, Freedom Hutchinson, general counsel for the Consolidated Rendering Company, on behalf of said Company, on oath depose and say that the papers and memoranda which that Company has failed to produce before the Grand Jury, and on account of which this Honorable Court is now asked to adjudge said Company in contempt, would, if produced in evidence before said Grand Jury, tend to criminate that Company and render it liable to criminal prosecution.

FREEDOM HUTCHINSON.

STATE OF VERMONT, *County of Chittenden, ss:*

BURLINGTON, *October* 30, 1906.

Subscribed and sworn to before me,

J. J. ENRIGHT,
Notary Public.

23 STATE OF VERMONT, *Chittenden, ss:*

In re PETITION FOR CONTEMPT
against
CONSOLIDATED RENDERING COMPANY.

Answer of the Consolidated Rendering Company.

Now comes the Consolidated Rendering Company not waiving any of its rights under the motion to dismiss already filed in this case, and makes answer as follows:

That during the time covered by the notice to produce service upon said Company, a copy of which notice is attached to the petition in this case it kept and filed with the records of the Company at Burlington, certain papers or memoranda similar to the papers attached to the petition of the Attorney-General in this case relating to the transactions of said Company with the Cattle Commissioners of the State of Vermont.

That on or about the 20th day of August, 1906, all of the books and papers of the Company kept at Burlington relating to the transactions with the Cattle Commissioners were sent to the Main Office of the Company in Boston, for the purpose of examination and verification, and that after said examination and verification and long before the service of said notice to produce upon said Company said papers or memoranda were destroyed at said Boston.

Wherefore said Company was unable to produce the same at the time of service of said notice upon it to produce.

And further answering said Company says that it was unable to find two (2) checks included in said notice to produce, and
24 and it is therefore unable to produce said checks. That aside from said papers which are not in existence, and said checks, which said Company is unable to find, it has produced all of the books and papers called for in said notice before the Grand Jury, where it was required to produce the same.

Wherefore said Company says that it should not be dealt with as for contempt for the reason that it is unable to produce said papers.

FREEDOM HUTCHINSON,
R. E. BROWN,
J. J. ENRIGHT,
Att'ys for the Consolidated Rendering Co.

STATE
vs.
CONSOLIDATED RENDERING CO.

Chittenden County Court, September Term, 1906.

Proceeding for Contempt.

Replication to Defendant's Answer.

And now comes the State of Vermont and, replying to the answer of the defendant in the above cause, says:

That it avers that the allegations made by the defendant in its said answers are not true; and thereupon the State submits the issue to the Court for hearing and determination as the law provides.

CLARKE C. FITTS,
Attorney General.

25 *Ruling of the Court.*

It is conceded by the defendant company that before and on the 22nd of August last it had in its possession and subject to its control the papers that it was subsequently notified to produce before the Grand Jury. It says that the reason it did not comply with that notice was that on the 22nd of August last those papers were destroyed by one of the employes of the company, the man who had charge, according to his testimony, of that branch of the business. That man, Mr. Mantor, testifies that he had no notice and had no reason to suppose that the State wanted those papers for any purpose or ever would want them, that he saw something in the papers arising out of our political campaign which connected that company and the Cattle Commissioners of Vermont in some way, that he thought perhaps there might be something irregular between the company and the Commissioners and so he thought he would find out about that,

and to that end he sent here just before the 21st of August to the book-keeper of the company here and directed him to bring all the books, papers, accounts and memoranda of every kind and description that showed any transactions between the company and the Cattle Commissioners. He says that on the 22nd day of August that book-keeper appeared at the home office in Boston with all the papers and books that he had directed him to bring, and that was all the papers existing in this office touching any business transactions between the Commissioners and this company. And he further says that he looked them through, found no irregularity, saw no reason why they should be kept, and thereupon he destroyed them, tearing them up and throwing them into the waste basket and the waste was taken away, as he supposed, in the ordinary way. He further says that that thing never was done before. According to the due course of business in their office, in the office of that company, all those books and papers should be and remain here in the office of the company at Burlington, and this is the first and only occasion when anything of that kind was done. He said he took this as a precautionary measure,—says this is substance,—so as to see that the company was not involved in anything irregular in the law, or illegal. He says he didn't know at the time he destroyed them that they would ever be wanted,—that they were of no consequence to them and would be of no consequence to anybody.

It further appears that the general manager here, Mr. Brigham, was called upon by the State's attorney of this County con-
26 cerning this matter and some talk was had between them, but just what that talk was does not very definitely appear, and that after that talk, that first talk—I don't know but it was the second—and before he signed his affidavit which he gave to the State's attorney, dated on the 21st of August, here in Burlington, that he was in Boston at the home office, that he there had talk with Mr. Heath, the manager, concerning this matter,—the business of the Company with the Cattle Commissioners. He says he didn't tell Mr. Mantor about it; and Mr. Mantor, so far as he knows, didn't know that he had had any talk with the manager. This we find from the testimony was just before the 21st day of August. About that time, Mr. Mantor says a "day or two before" the books came to Boston, he telephoned to the book-keeper here to bring them there with all the papers; so we are satisfied from the testimony that about the time Mr. Brigham was in Boston talking with the manager, Mr. Mantor phoned the book-keeper here to take all those books and papers and bring them to Boston.

We believe from the testimony, and we have no reasonable doubt but that Mantor did know that the State's attorney had been looking up this matter to some extent, and that he did send up here to get these books and papers down there for the very purpose of keeping them out of this jurisdiction and keeping them where he thought they could not be produced.

He says in his testimony there was nothing there that would incriminate anybody. One of the grounds of the motion to dismiss here is that those papers might incriminate the Company, therefore

they are not obliged to produce them. Who is right about that, we don't know. We think that Mantor knew what Brigham had said down there, and we think that they came to the conclusion there that about the best thing to do was to get these books and papers out of Vermont as soon as they could, and they proceeded to do it.

The book-keeper, according to the testimony, went down to Boston on the night of the 21st of August, and produced those books and papers to Mantor there on the next day, and that day they were destroyed, as he says. We fail to find that they were destroyed. Nobody testifies to that except Mantor. We think he is absolutely discredited in his testimony when he says he didn't know anything about the proceedings up here,—hadn't any idea that they would ever be wanted, and he didn't send up here and get the books and papers for the purpose of keeping them away from the authorities of this State. We believe that he did that for the very pur-
27 pose of keeping them away. Otherwise, why should such a thing be done? It never was done before. Why should he destroy the papers when he got them there? If they showed no irregularity on the part of the Company, why should he want to destroy them? Why not keep them in the due course of business as they had always done before? It is a very suspicious circumstance in our judgment.

Another suspicious circumstance:—The book-keeper,—who had been the book-keeper for some time,—took those books and papers to Boston and never has been back here. He is the man of all others who would know most about this as a witness. It is said that these papers would not be admissible because they would not be independent evidence against anybody especially against third persons,—don't say they would not be independent evidence against the Company,—I am not meaning that now,—but they would not be independent evidence against third persons. That does not meet the situation. They are unquestionably corroborative evidence to corroborate the testimony of witnesses who knew about the transaction and took part in the transaction. Suppose the book-keeper was called as a witness. Then it is undoubted that those papers would be evidence in connection with his testimony; so it is very easy to see how those papers would be very material, if not as independent evidence against third persons, against these Cattle Commissioners, it is corroborative of the testimony of those who engaged in the transaction and who knew what the facts were.

It appears that those papers at the present would enable the Grand Jury, or any other person seeking the facts, to trace the history of every animal that was sold to this Company by the Cattle Commissioners. It further appears that without those papers it is impossible to do anything of the kind, to make any approach towards ascertaining and following up the transactions to know just what they were and just what became of the cattle; and yet this man says that he passed his judgment upon the matter that it was of no consequence to anybody, and so he destroyed them.

When Mr. Mantor is so thoroughly discredited as he is in our minds by his testimony concerning his want of knowledge as to what

was going on, we are not inclined to find upon his testimony alone the fact that those papers were destroyed. Of course as a matter of law, if a witness is found to have falsified, the trier of the fact is not forbidden to believe him, yet he should be believed, if at all, with great caution. Where his testimony stands unsupported and uncorroborated, it is oftentimes difficult for the trier to believe him at all. That is our condition here.

28 So we find that these books and papers were in the possession of the Company at the time they were taken away from here, and we fail to find that they are not now in their custody and control so that they can produce them. Thus failing to find, we find them guilty of contempt.

STATE OF VERMONT:

Supreme Court.

Petition for Writ of Certiorari.

To the Honorable Supreme Court of the State of Vermont:

Respectfully represents your petition the Consolidated Rendering Company as follows:

That it is a corporation duly organized under the laws of the State of Maine, and that it is lawfully doing business in Burlington, in the County of Chittenden and State of Vermont under the name of the Burlington Rendering Company.

That on or about the tenth day of October, 1906, and on other days prior thereto, the Grand Jury within and for said County of Chittenden was in session at Burlington in said County, and among other things was investigating a matter of complaint pending in which F. A. Rich, Victor I. Spear, George Stephens and G. H. Terrill were charged with having unlawfully sold diseased meat for food purposes at said Burlington.

That on the tenth day of October, 1906, your petitioner was served with notice under the provisions of the statute of Vermont, Act of 1906, entitled, "An Act to compel the production of books and papers by corporations," to produce before said Grand Jury of the

29 County of Chittenden at the Court House in said Burlington in said County on the 17th day of October, 1906, at ten o'clock in the forenoon, in which the things to be produced were described as follows, viz:

"The following books, papers, correspondence data and memoranda, to wit:

All the books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements, at any time made or kept by your Company at said Burlington, which contain any account with, statement of, or relating to or concerning any deal or business with any of the following parties since January 1st, 1904.—Dr. F. A. Rich of Burlington, Vermont; Victor I. Spear of Randolph, Vermont; Dr. George Stephens of Hartford, Vermont; George H. Terrill of Mor-

ristown, Vermont, or the Cattle Commission of the State of Vermont, or the State of Vermont, also all books, vouchers and receipts issued by said Company or by any officer or employee of your Company at said Burlington since January 1st, 1904, to any of the above-named parties; also all statements, correspondence, data, memoranda, books, vouchers and receipts made or kept at said Burlington, which relate to the payment by your Company to any of the above parties on the following dates and for the amounts specified opposite each date:

	1905					
	Jan.	4.....	$15.56	Nov.	8.....	$85.74
			358.94		13.....	135.37
		20.....	242.94		24.....	138.82
		26.....	127.32	Dec.	1.....	23.44
		31.....	8.03		2.....	51.43
30	Feb.	4.....	47.13	Dec.	4.....	376.35
		6.....	219.49		4.....	424.90
	Jan.	30.....	12.84		12.....	161.43
	Feb.	11.....	113.62		21.....	140.90
		27.....	35.00		25.....	339.74
	May	2.....	22.24		26.....	168.53
		2.....	206.56		30.....	17.55
	June	12.....	49.00			41.93
	May	6.....	17.64			225.04
	Sept.	16.....	87.74			104.98
	Oct.	26.....	89.04			130.54
	Feb.	9.....	54.52	Jan.	27.....	69.57
		12.....	39.03			121.67
		12.....	46.85			4.68
		7.....	119.13	July	6.....	6.88
		7.....	115.68	Aug.	23.....	107.41
		27.....	42.14		17.....	4.51
	Mar.	6.....	6.30		28.....	15.59
		21.....	9.35		*	
		30.....	17.11	Apr.	3.....	35.53
	Apr.	26.....	45.43	May	1.....	262.12
		11.....	56.67		21.....	44.78
		25.....	41.15	June	1.....	86.96
	June	18.....	61.07		14.....	58.93
		27.....	6.45		29.....	10.01

All the foregoing to be used as may be legally admissible as evidence before said Grand Jury, relative to the matter of complaint pending, and then and there to be investigated by said Grand Jury, in which the said above-named F. A. Rich, Victor I. Spear, George Stephens and G. H. Terrill are charged with having unlawfully sold diseased meat for food purposes at said Burlington."

31 That said notice was general, vague and uncertain, and did not extend by any particular description to any specific books or papers on account of which it is now claimed that your petitioner is in contempt, but extended over a long time and required

books and papers relating to a certain matter or transactions therein set forth.

That on or about the 17th day of October, 1906, your petitioner did, in good faith, undertake to comply with the requirements of said notice, and did produce before said Grand Jury, all the books of account, data and memoranda and other papers requested by said notice, as it understood the requirements thereof, which were in the possession or control of your petitioner at the time of the service of said notice upon it.

That after the production of said books and papers before said Grand Jury, no notice whatever was served upon your petitioner that any specific books or papers intended to be covered and included in said notice, had not been produced, and no notice that your petitioner had failed to comply with the requirements of said notice to produce, until the service upon it of the Order of Notice issued by said Chittenden County Court to show cause why it should not be dealt with for contempt hereinafter referred to.

And your petitioner further says that it appears by the specific description of the papers referred to in said Order of Notice to show cause, that such papers would not be admissible in evidence in any proceedings before said Grand Jury against said Cattle Commissioners, and if produced would only tend to criminate your petitioner and render it liable to criminal prosecution.

That on the 19th day of October, 1906, said Grand Jury made a report to said County Court stating in effect, among other things, that your petitioner had failed to produce in obedience to said notice, certain written statements and memoranda filed and kept by your petitioner which were necessary and important as evidence bearing upon the matter under investigation by said Grand Jury.

And attached to and accompanying said report of the Grand Jury, was a petition addressed to said County Court, signed by Honorable Clarke C. Fitts, Attorney-General of the State of Vermont, setting forth the same facts as represented by the Grand Jury and praying said County Court to summon your petitioner before it to be dealt with for contempt for neglect and failure to produce said statements, data and memoranda as required by said notice.

32 Said report of the Grand Jury and said petition of the Attorney-General are a part of the record of the proceedings in said County Court, a copy of which is hereto annexed and made a part of this petition.

That on the 19th day of October, 1906, said County Court issued a notice commanding your petitioner to appear before said County Court at said Burlington on Tuesday, the 30th day of October, 1906, at eleven o'clock a. m., to show cause *by* it should not be dealt with for contempt.

That on said 30th day of October, 1906, your petitioner appeared and filed before said County Court the motion to dismiss, a copy of which is included in the record hereto annexed.

That on or about October 30th, 1906, said County Court overruled your petitioner's motion to dismiss, and adjudged your petitioner

guilty of contempt of court, and ordered that it pay a fine of three thousand dollars.

That on November 2nd, 1906, an execution issued from said County Court upon said judgment, and was placed in the hands of Frank E. Lord, one of the Deputy Sheriff's within and for the County of Chittenden, to be executed.

Your petitioner further represents that the statute, by authority of which said County Court was acting in all proceedings against your petitioner, and when it issued said notice to produce, and said notice to show cause why your petitioner should not be dealt with as for contempt, and when it adjudged your petitioner in contempt, was unconstitutional and void, being contrary to the Constitution of the United States and the Amendments thereof, and the Constitution of the State of Vermont; that by reason thereof, said County Court was without jurisdiction to issue said notices or to punish your petitioner for contempt in the manner above set forth.

And your petitioner further represents that by reason of the provisions of the Constitution of the United States and the Amendments thereto, and also by reason of the provisions of the Constitution of the State of Vermont, your petitioner was justified in refusing to produce the statements and memoranda referred to in said report of the Grand Jury, on the ground that the production thereof would tend to criminate it; that your petitioner duly claimed the privilege thus guaranteed to him by said Constitutional provisions when it first appeared before said County Court as appears from said motion to dismiss, above referred to, and that said privilege so claimed by your petitioner was denied by said County Court, contrary to law, and without regard to your petitioner's rights.

33 And your petitioner further says that a Writ of Certiorari should be issued in its favor, inasmuch as it is necessary to the furtherance of justice and the regular execution of the laws.

Wherefore your petitioner prays that the Writ of Certiorari may issue, directed to the County Court for said County of Chittenden, and to the Clerk thereof, commanding them to certify the record of their proceedings in the matter of contempt proceedings against your petitioner so that justice may be done.

And your petitioner further prays that the finding, judgment, proceedings, ruling and decree of said County Court may be quashed, annulled and reversed for various errors and irregularities therein, as set forth in this petition, and for such other errors and such other proceedings as law and justice may require.

And your petitioner further prays that said **Frank E. Lord, deputy** sheriff, be ordered to desist levying said execution held by him until he shall receive the further order of this Honorable Court.

CONSOLIDATED RENDERING COMPANY,
By CHAS. R. HANNAN, *Treasurer.*

COMMONWEALTH OF MASSACHUSETTS, *Suffolk, ss:*

BOSTON, *November* 10, 1906.

Personally appeared before me Charles R. Hannan, Treasurer and made oath that the allegations contained in the foregoing petition by him subscribed are true.

JAMES F. LOCKWOOD,
Notary Public, Commonwealth of Massachusetts.

34 STATE OF VERMONT, *Chittenden, ss:*

Supreme Court.

CONSOLIDATED RENDERING CO.
vs.
STATE OF VERMONT.

Petition for Writ of Error.

To the Honorable Supreme Court of the State of Vermont:

On a judgment of the County Court within and for the County of Chittenden, taken and holden at Burlington in said County of Chittenden on the thirty-first day of October, A. D. 1906, wherein the State of Vermont, by the Attorney-General of said State, is petitioner praying that the Consolidated Rendering Company be dealt with for contempt and said Consolidated Rendering Company is respondent, as appears by copy of record hereto annexed.

And the said Consolidated Rendering Company prays for a Writ of Error to issue, returnable to the next Supreme Court to be holden at Montpelier, in the County of Washington, on the second Tuesday of January, 1907, and assigns as errors in the record of the process and judgment aforesaid, the following, to wit:—

Assignment of Errors.

That the Court erred in finding the Consolidated Rendering Company liable for contempt:

First. Because the report of the Grand Jury of record in the contempt proceedings, and the affidavit of the general counsel for said Company sufficiently show that the papers in question, if
35 produced, would tend to criminate said Company, and render it liable to criminal prosecution, and the constitutional privilege not to criminate itself was duly claimed by the Company.

Second. Because the statute of Vermont, Act of 1906, entitled, "An Act to compel the production of books and papers by corporations," under and by virtue of which the Court was acting, was unconstitutional and void, and the Court was without jurisdiction.

Third. Because it overruled the motion to dismiss filed by said Company.

Fourth. Because it does not appear that the papers in question,

if produced, would have been legally admissible in evidence before the Grand Jury.

Fifth. Because no proper or sufficient notice to produce was given to said Company on which contempt proceedings could properly be instituted.

CONSOLIDATED RENDERING COMPANY,
By CHAS. R. HANNAN, *Treasurer.*
FREEDOM HUTCHINSON,
ALBERT S. HUTCHINSON,
Ames Building, Boston, Mass., Counsel for Petitioner.

35½ [Endorsed:] No. 136. The Case. *In re* Petition for Contempt *v.* The Consolidated Rendering Co.

36 WATERMAN, *Judge:*

The respondent has adopted three methods of bringing the case before this court for reviewing the proceedings of the County Court. Exceptions were taken to the rulings of the court, which were duly filed; a petition for a writ of certiorari was filed in this court; and also a petition for a writ of error. It is of no importance in this case which of the first two methods is deemed the most appropriate, nor would a discussion of the methods pursued in other jurisdictions be beneficial. We have a statute under which such a case may be taken to the Supreme Court on exceptions, V. S. 1625. It is true our statute, V. S. 1610 to 1612 provides for bringing contempt proceedings before this court by *habeas corpus,* but of course that applies only to cases where the relator is actually in confinement for non-compliance with some order of court. It can have no application in a case like this. A writ of certiorari is unnecessary in this case as the exceptions are sufficient to bring up the full record, and to raise all questions which the respondent desires to present. Section 1625 has no reference to writs of error, hence their use in this respect remains the same as before the law of that section was enacted, not appropriate except where the county court exercises its jurisdiction substantially according to the course of the common law. Beckwith *v.* Houghton, 11 Vt. 602. Stiles *v.* Windsor, 45 Vt. 520.

It is conceded by counsel for the respondent that the findings of fact by the court below are conclusive, and the authorities are abundant as to this. It is also conceded that the power to punish for contempt is inherent in courts of law, and their action is not
37 reviewable if within their jurisdiction. The power to punish for contempt is a discretionary power, and must be fairly exercised, and when so exercised in a case within the jurisdiction of the court no review can be had. So, really the only question here, is as to the jurisdiction of the court.

The grand jury was engaged in the investigation of an alleged breach of a criminal statute by certain persons in this State, and in the course of those inquiries an order was made upon the respondent company by the court, under the provisions of the statute, to produce

the books and papers mentioned in the order. The company produced some books and papers, but not all those required, and the grand jury having reported to the court the neglect of the company to produce the requisite documents, a complaint was filed by the Attorney General and the company was summoned before the court to show cause why it should not be dealt with for contempt.

These proceedings were had in pursuance of a statute of this State passed by the legislature at its session held in 1906, the first section of which is as follows:

"Any corporation doing business within this State whether organized under the laws of this or any other State or country, shall, when notice thereof is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission, acting under the authority of this State, all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to, or information concerning the suit, proceeding, action, charge, or subject of inquiry pending before, or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept
38 within the State of Vermont, and are in the custody or control of such corporation within this State or elsewhere at the time of such notice upon it."

The second section is identical with the first except that the books and papers mentioned are limited to those "which in any way relate to, or contain entries, data or memoranda concerning any transaction within the State of Vermont or with any party residing or having a place of business within the State of Vermont." The third section relates to the manner of service of the order to produce; the fourth provides for punishment for contempt in case of noncompliance with the order, and that execution may issue for the collection of any fine imposed. These sections are all that are of importance in this case.

The respondent claims that the court has no jurisdiction because the statute is unconstitutional. It is claimed that this statute contravenes the provisions of the tenth and eleventh articles of the Constitution of Vermont, and of the 14th Amendment to the Constitution of the United States.

1. It is insisted by the respondent that the act is in contravention of the eleventh article of the Constitution of Vermont, in that it authorizes a search and seizure of books and papers of a corporation; and also because it compels the production of such books and papers in court without providing compensation for the time and expense in so doing. It is claimed that the act is not restricted, as it should be, to permitting such books and papers as are admissible, to be called for, but includes all in the custody or control of the corporation.

The act restricts the order to such as "contain any account of, reference to, or information concerning the suit proceedings,
39 action, charge or subject of inquiry, pending before, or to be heard by such court." This is about as definite and limited a provision as could be inserted in an act which could be of general use in its application to all kinds of cases likely to arise. The order

in this case was limited to producing such books and papers as contained accounts or entries relating to dealings with the parties being investigated, and especially those containing certain entries specified therein, giving dates and items; to be produced and used "as may be legally admissible as evidence before said grand jury, relative to the matter of complaint pending, and then to be investigated by said grand jury," against the persons named.

The act leaves it for the tribunal to determine what books and papers are needed and may be called for, in the order to be issued, and to describe them as far as practicable. The order in this case is not subject to the criticism made by the court in Carson *v.* Hawley, 82 Minn. 204, that it is so general that it does not indicate any knowledge on the part of the person demanding documentary evidence, of any book or paper desired. The order indicates that the grand jury had knowledge of the dates, and of many items they wished to verify by the books and papers, and these were plainly stated in the order. It required no undue and improper inquisition into the affairs of the company. By comparison with the items and dates given in the order the books could easily have been found. The court in its findings of facts says: "It is conceded by the defendant company that before and on the 22nd day of August last it had in its possession and subject to its control the papers that it was subsequently notified to produce before the grand jury." So it required no search on the part of the company to find them, and its officials or employees knew they had them at that time. It was no hardship or detriment to their business to require them to be produced. According to the statements made in behalf of the company before the court, they were not needed in carrying on business, for it was asserted by the witness they had been destroyed. The order was certainly not an unreasonable search or seizure, but a requirement under this statute, reasonably made, for the production of certain specified books and papers, to be used, so far as admissible, before the grand jury; the order to be served by the delivery of a copy.

No objection was made before the grand jury or the court, on account of indefiniteness of description. The witness who testified in behalf of the company, knew just what was required, and the concession above quoted was made. If indefiniteness was really an objection, the witness might have stated the difficulty he encountered in understanding the order, and complying with its terms. If he was the person delegated by the company to appear and respond to the order, it was his duty to appear and produce the books and papers, or give a reasonable and truthful excuse for their non-production, and then if he desired, or was so advised, could raise any objection to their use in evidence. Doe *v.* Kelley, 4 Dowl. Pr. 273; Amey *v.* Long, 9 East 473; Wig. on Ev. #2200, at page 2979.

The proceedings in this case under the statute, were in effect the same as under a *subpœna duces tecum*, which is an ancient writ,—Starkie Ev. 86, note—with this difference, that this statute authorizes the service of the order for the production of books and papers upon the corporation itself, while a *subpœna duces tecum* without

the statute would be served upon some officer or employee
41 commanding him to appear and bring with him the documents. The object sought is the same in both cases, the production of evidence to be used, so far as admissible before the court. When service was made it was the duty of the corporation to comply with the order. No force was used or threatened or authorized by the order; no quest was made by the officer. There was no interference with the business, or with the property rights of the corporation. We do not think the eleventh article of our State Constitution was intended to interfere with the power of courts to compel, through a *subpœna duces tecum*, or such a proceeding as is authorized by this statute, and was used in this case, the production in any proceeding in court, of documentary evidence. Hale *v.* Henkel, 201 U. S. 43, 73; Amey *v.* Long, 9 East 473; Bull *v.* Loveland, 10 Pick. 9; U. S. Express Co. *v.* Henderson, 69 Iowa, 40; Green, Ev. 469*a;* 1 Chit. Cr. Law, 577.

There might be a case where such an order and process might be so made, and used in such a manner as to contravene the provisions of that article of the Constitution. The order might be so broad and unlimited, in its scope, as to constitute an unlawful inquisition into the private affairs of the persons summoned, or authorize such a search and disturbance of business as to entitle him to protection against it. But, that is not the case with these proceedings.

2. The respondent further claims that the proceedings were in infringement of the same article of our Constitution because no tender was made to the company to cover its fees and expenses for appearing before the court with the books and documents. The statute of 5 Elizabeth, chapter 9, section 12, provided for summoning witnesses to attend court, and that they should be tendered
their expenses, and for a fine for non-attendance, as well
42 as damages to the party injured, and ever since that time statutes in many different jurisdictions have contained provisions for tendering fees to witnesses. There is such a statute in this State. V. S. sec. 1252. But the statute of Elizabeth related only to witnesses in civil cases; so does our own; and so far as we know, none of the statutes in the different states contain any provision for tendering fees to witnesses summoned in behalf of the State in criminal cases. There is no such statute in this state, and no such practice has ever prevailed here. Under our laws it is the duty of any witness summoned upon a subpœna issued in behalf of the State in a criminal case to appear according to the summons, without a preliminary tendering of his fees. Having performed his duties as a witness, he is the- entitled to his fees, which are allowed by statute, or by order of the court. He has no right to refuse to attend because his fees are not tendered. It was said by the Duke of Argyle in 1742 that the public has a claim to every man's evidence, and Lord Hardwick, assenting to this statement, added: "It is undoubtedly true that the public has a right to all the assistance of every individual." This general proposition has been repeated many times, in various courts of England and of this coun-

try. The duty to appear upon a state subpœna and give testimony is not conditional on pre-payment of fees.

Mr. Wigmore says: "That condition was never imposed upon the prosecution in criminal cases * * *. That burden upon a witness to appear without tender of fees is not considered by the law a hardship in criminal cases." Wig. on Ev. Sec. 2201; 2 Hawk. P. C. Ch. 46, Sec. 168.

In this state, by order of court, upon a showing by the respondent that he is peculiarly unable to procure the attendance
43 of his witnesses, the names of his witnesses, limited to the number allowed by the court, may also be inserted in the subpœna in behalf of the State, and in such case the fees are not paid in advance. In many states by statute, fees of witnesses on both sides in criminal cases, need not be tendered in advance. No rights of the respondent in this respect under the above named article of our organic law, have been violated. A similar holding was had in West *v.* State, 1 Wis. 209, which case will be more *pra*ticularly noticed later.

3. It is further contended that the statute and these proceedings are contrary to the provisions of Article ten of our Constitution, providing in part * * * "nor can he be compelled to give evidence against himself," because the corporation was ordered to produce the books and papers mentioned, which it now claims would tend to its crimination. When a claim for protection under this provision has been properly raised, the courts of this State, and the Federal courts under the fifth amendment to the Constitution of the United States, which is similar have always given it fair and careful consideration. Such a claim must be presented to the court, by the witness, for it is a personal privilege, which belongs to the witness alone, and should be made in good faith and under oath. In determining the question here raised it is necessary to notice more fully the proceedings in the court below. Before the grand jury there was an investigation of charges against certain persons, for a breach of criminal statute of this State. Under the statute of 1906 an order of that court dated October 10, was issued to the company to produce certain books and papers before the grand jury October 17, to be used so far as admissible in that investigation, which was duly served. October 17 the company pro-
44 duced certain books of account and checks, but not all those required, and produced nothing further in response to the notice. October 19 the grand jury reported to the court what the company had done and what it had failed to do, by way of compliance with the order. On the same day the Attorney General filed in court the petition in this case, asking that the company be dealt with for contempt; and on the same day the court issued notice to the company to appear October 30, to show cause why it should not be so dealt with. The company by its attorneys filed a motion to dismiss the petition, first, because the memoranda and papers called for are not legally material and competent evidence in the investigation being made by the grand jury, secondly, because it is sought by said petition to compel said company to bring into this

State, for use before said grand jury, papers and memoranda which may tend to criminate said company and render it liable to criminal prosecution; and thirdly, because said statute and the requirements thereof are in contravention of the fourth, fifth, and fourteenth amendments of the Constitution of the United States, and of the tenth and eleventh articles of the Constitution of the State. October 30, the day set for hearing on this petition, one of the attorneys of the company filed his own affidavit, sworn to before a notary public, in substance that the papers and memoranda which the company had failed to produce before the grand jury, would if produced in evidence tend to criminate the company and render it liable to criminal prosecution. On the same day the company also filed an answer to the petition, setting forth that during the period covered by the order it kept and filed at its office in Burlington certain papers and memoranda similar to the papers
45 attached to the petition; that on or about August 20 all of the books and papers of the company kept at Burlington relating to the transactions mentioned were sent to the main office of the company at Boston for examination and verification, and long before the service of the order, said papers or memoranda were destroyed, at Boston; that it was unable to find two of the checks called for, and that aside from said papers, memoranda and checks it had produced everything called for in the notice. To this answer the Attorney General filed a replication, denying its truth and joining issue thereon. On testimony introduced the court made findings of fact, adjudged the company guilty of contempt, and imposed a fine. The court finds from the testimony that Mr. Brigham, manager of the Burlington plant, was in Boston just before August 21st and had a talk with Mr. Heath, the manager of the company, in regard to the business of the company in Vermont, in connection with the Cattle Commissioners, and about the time Brigham was in Boston, one Mantor, an employee of the company in Boston telephoned the book-keeper in Burlington to bring all the books and papers to Boston, and he did take them all there. And the court finds, notwithstanding the claim of Mantor, that the books and papers were destroyed, with the exception of those produced before the grand jury; that they were not destroyed, that Mantor knew that the matter was being looked up in Vermont to some extent, and that he sent for the books and papers to be brought to Boston for the very purpose of taking them out of the jurisdiction of this State, and keeping them where he thought they could not be produced. The finding is, in effect, that the testimony and circumstances show that the story of Mantor
46 of the destruction of the books and papers was false, that they were still in existence, and in the custody and control of the company. Nobody testified they were destroyed except Mantor, and on account of the contradictory statements made by him and the suspicious circumstances, the court says he was absolutely discredited. A suspicious circumstance in the mind of the court was that the bookkeeper of the Burlington plant, who took the books and papers to Boston, has never returned to Vermont, and

gave no testimony before the court in any form. As the court said in its findings, he was the man of all others who knew, and could testify in regard to these matters. The papers would enable the grand jury to trace the history of every animal sold, and without them this would be impossible, and they would be corroborative evidence as against the persons named in the investigation.

The court further says that Mantor, the only witness who says he saw the books, testified there was nothing there that would incriminate anybody. He was the only witness produced by the company as to this; no witness testified there was anything in them which was incriminating. The court has not found that there was. The substance of these findings by the court is, that the claim of incriminative testimony was not set up by any witness, and was never asserted and maintained by the company in any way previous to the commencement of the contempt proceedings and then was made by counsel, but not by any witness; and that the witness who testified in regard to the books was discredited. Was the privilege properly and legally claimed by the company.

The first mention of such a claim was in the motion to dismiss. This was after the failure to produce the books and papers, and after the contempt proceedings had been commenced. The motion to dismiss is signed by counsel for the company. The next
47 mention is in an affidavit of one of the attorneys making the naked statement that the papers were incriminating. It is not stated that the papers were incriminating. It is not stated that the affiant had ever seen the books or papers. He makes no statement as to the contents or upon what facts contained in them he based his opinion or statement that they would be incriminating. A bare expression of opinion, or legal conclusion without a statement of the facts upon which it was founded may not have had much weight with the court, even if this was the proper method of asserting the privilege.

There has been some difference in the statement of the law as to the privilege of a witness, and its assertion and enforcement, in the courts of England and of this country, but the rule at the present time is quite uniform. When a witness has been duly summoned it becomes his duty to attend at the time and place named in the subpœna. It seems well settled that if he is required to produce documentary evidence by a *subpœna duces tecum* it is his duty to produce what is called for, if it is in his possession or control. There may be, of course, good reasons why the witness is unable to attend, and should be excused, but there is nothing in this case indicating the existence of any excuse for non-attendance by some person duly authorized by the company. The findings of the court are such that no excuse appears for not producing the documents called for. Whether they would be proper testimony to be used in the case, when produced, is not for the witness to say: their relevancy is for the court to determine, and not for him. Rapalje Law of Wit. 302.

"But this right of a mere witness to raise the question
48 of jurisdiction in this matter (by a refusal to testify) has not met with the favor of the judges, and in several juris-

dictions is virtually denied; a *fortiori* a witness cannot be permitted to refuse to answer a question on the ground that it is irrelevant. To hold that a witness could decide for himself upon the relevancy of a question, against the opinion of the judge presiding, or the officer taking the deposition, would be subversive of all order in judicial proceedings." Rapalje on Wit. S. 303. Also in section 304, "The office of the writ of *subpœna duces tecum* extends only to compel the *bringing* into court by a party or witness of books and papers of which he has control, and an inspection of which is deemed to be essential to the proper determination of the issues presented for trial. The writ has no effect upon the question of the admissibility of books and papers so brought in as evidence in the case." Citing: Bonesteel *v.* Lynde, 8 How. (N. Y.) Pr. 226; Mott *v.* Consumer's Ice Co., 52 How. (N. Y.) Pr. 244.

"In all cases it is a question for the consideration of the judge at the trial, whether upon the principles of reason and equity, production should be required under a subpœna." Amey *v.* Long, 9 East. 475; Corson *v.* Dubois, 1 Holt N. P. 87.

"The question of relevancy is never one for the witness to concern himself with; nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the court requires; and the court can then, to its own satisfaction determine by inspection whether the documents produced are irrelevant or privileged. This does not deprive the witness of any rights of privacy since the court's determination is made by its own inspection without submitting the documents to the opponent's view, and unless such a mode of
49 determination were employed, there could be no available means of preventing the constant evasion of duty by witnesses." Wig. on Ev. 2200, citing Amey *v.* Long, 9 East 473. In that case Lord Ellenborough delivered the opinion and in which Park, Marryatt and Bell, the distinguished counsel for the successful side said: "As the obligation of the witness to answer by parol does not depend upon his own judgment, but on that of the court, the same rule must prevail with respect to his production of documentary evidence. The witness is bound, at all events, to bring with him the papers which he has been subpœned to produce; and when it is in court, he may then state any legal or reasonable excuse for withholding it, of which the court will judge."

A witness must obey a subpœna and be sworn; then he can claim his privilege. *In re* Ekstein, 148 Pa. St. 509; U. S. *v.* Kimball, 117 Fed. 156.

Many other cases might be cited, bearing on the question of the duty of a witness to obey a subpœna and actually appear and in case of a *subpœna duces tecum* produce the documentary evidence called for, but these are sufficient to answer the claim made in the motion to dismiss, that the testimony was not material, and to show beyond question that it is the duty of a witness to respond to a subpœna by appearing, and producing books and papers, leaving all questions which he desires to raise to be settled and determined when he and the testimony demanded are before the court.

The testimonial privilege is purely personal. It can be raised only

by the witness himself; whether the testimony is privileged is for the court to decide. Wig. on Ev. 2295, 2270; Chamberlain *v.* Wilson, 12 Vt. 491; Janvrin *v.* Scammon, 29 N. H. 280.

50 It is upon this question that there has been some difference in expression by different courts. In some cases the statement has been so broad that it seemed to give the witness the right to decide whether he would assert the privilege, and also, whether he would answer the question, thus leaving nothing for the court. But the great tendency of modern cases has been such, that rule seems now to prevail in this country, which has but few exceptions. Rapalje Law of Wit. S. 266, says: "The result of a comparison of the adjudications seems to be that the preliminary question, "can any answer, responsive to the question, subject the witness to a criminal prosecution.—" must be decided by the court, and not by the witness. If the court holds the affirmative of that question, then the witness has a right to decide whether the answer he would give to the question would have such an effect;" also, "The court will require to be satisfied that the witness is acting an honest part and that he may incur danger by answering; when satisfied of this, he will allow the privilege."

"Where a party calls his adversary as a witness, he has a right to insist on his going on the stand to be sworn, altho' the counsel for the witness state to the court that he will not answer the questions that will be put to him, as the answers would tend to incriminate him. If the questions have that tendency, the objection must be taken by the party himself on oath." Rapalje on Contempt, 100; Boyle *v.* Wiseman, 29 Eng. L. & Eq. 473 Powell's Ev. (4th Ed.) 109.

The question may be lawfully put, however its tendency to draw out self incriminating testimony, and the witness must decide himself whether he will assert his privilege, or waive it an- answer it. 1 Green. Ev. S. 451; 2 Phil. Ev. 783; Whart. Crim. Ev. sec.

51 465.

Ch. J. Marshall in the trial of Aaron Burr said: "It is the province of the court to judge whether any direct answer to the questions which may be proposed will furnish evidence against the witness." And in this case he also said in substance that if the witness stated under oath that the answer would tend to criminate him, he would not be compelled to answer. Taking all he said together, a fair conclusion would be that the privilege must be asserted under oath by the witness, and if his statements are found to be true the court will not compel him to answer.

In Reg. *v.* Garbett, 2 Car. & K. 474, the court held that if a witness asserts his privilege and there appears to be ground for believing that his answer would criminate him he is not compellable to answer. In another English case the court held that a merely remote possibility of legal peril to a witness from answering a question is not sufficient to entitle him to the privilege of not answering; that to entitle him to this privilege, the court must see from the circumstances of the case and the nature of the evidence which he is called to give that there is reasonable ground to apprehend danger to the witness from his being compelled to answer; that the danger to be

apprehended must be real and appreciable, with reference to the ordinary operation of law in the ordinary course of things; that the position that the witness is sole judge as to whether his evidence would bring him into danger of the law, and that the statement of his belief to that effect, if not manifestly made *mala fide*, should be received as conclusive, is untenable. But that if the fact of the witness being in danger be once made to appear, great latitude
52 should be allowed to him in judging for himself of the effect of any particular question,—Reg. *v.* Boyce, 1 Best & Smith 311.

There has been some modification of the statement of the law in the opinion of Ch. J. Marshall in the Burr case, as to the right of the witness to judge for himself whether his answer will expose him to prosecution, in a number of American cases, and it is held more generally that it is for the court to decide after claim made, by the witness, of his privilege. Chamberlain *v.* Wilson, 12 Vt. 491.

Chief Justice Shaw, in Ball *v.* Loveland, 10 Pick. 9.

"It has been decided, though it was formerly doubted, that a *subpœna duces tecum* is a writ of compulsory obligation which the court has power to issue, and which the witness is bound to obey, and which will be enforced by proper process to compel the production of the paper, when the witness has no lawful or reasonable excuse for withholding it."

"But of such lawful or reasonable excuse the court at *nisi prius* and not the witness is to judge."

In State *v.* Thaden, 43 Minn. 253, Mitchell, J., in delivering the opinion, which contains a very full and clear discussion of the subject, says:

"All the authorities agree to the general proposition that the statement of the witness that the answer will tend to criminate himself, is not necessarily conclusive, but that this is a question which the court will determine from all the circumstances of the particular case, and the nature of the evidence which the witness is called upon to give." This opinion cites with approval the rule laid down by Cockburn, L. C. J. in Regina & Boyes before cited. We understand this is practically the rule of this State.

53 The respondent here was not a party; was not charged with any crime, but was merely asked to perform its duty as a witness. Being summoned and appearing before the grand jury with the documentary evidence would not be a violation of its constitutional rights. The privilege of a witness could then be claimed or not, as seemed advisable; if not claimed, it would be waived.

In State *v.* Duncan, *et als.*, 78 Vt. 364, this court considered the question of incriminating testimony brought up in a different form. it was upon a demurrer to a plea in abatement to an indictment, alleging that the indictment was found upon testimony of the respondent, criminating himself, which he was compelled to give before the grand jury. It is there said that the privilege is that of the witness and he alone can claim it, and is waived if not seasonably asserted. The plea did not show that the respondent asserted his privilege. The compulsion alleged was held to be a conclusion of

the pleader, from the fact and not justified as stated. In that case the witness appeared and testified before the grand jury, but did not claim his privilege. Here he refused to produce the testimony, and therefore no question of privilege in regard to it arose before the grand jury or court.

We have called attention to the requirements of the law, as shown by the above authorities as to a claim of privilege by a witness, mainly for the purpose of showing the necessity of the claim being made by the witness himself, under oath and in court, and that the claim having been asserted by the witness must be considered and acted upon by the court. The witness cannot refuse to obey a subpœna, and still claim the privilege that his testimony, if given, would incriminate himself.

54 Neither can a witness disobey a *subpœna duces tecum* and refuse to produce books and papers called for, and still claim the privilege that the books and papers if produced, would tend to criminate him. To permit such a course to be taken would be to permit courts of justice to be trifled with, and the course and progress of the law to be obstructed and delayed. The privilege of a witness as to these books and papers was never asserted in any manner allowed or authorized by law. It was not shown or claimed to the court, before the contempt proceedings were commenced, that they would tend to incriminate the corporation, or that the privilege of a witness as to it was claimed. The only excuse made by the witness Mantor was that they had been destroyed, and this was found by the court to be untrue. This being so, the constitutional question does not arise, for the respondent never put itself in a position to raise it.

We do not take the view of the respondent, in argument that the question of privilege was properly raised by the motion to dismiss, and that no such question could have been raised before the grand jury. Such a question of privilege could not be raised by a motion to dismiss the petition. A motion to dismiss is not issuable. It reaches defects only which appear on the face of the pleading to be affected by it. The petition contains no allegation relating to any claim or privilege or any testimony which appears to be incriminating. It sets forth the facts of the order, service and refusal to produce. The motion to dismiss alleges new matter, the claimed privilege, as the ground for dismissal. No precedent has been shown for this method of making a claim of privilege. Besides, this was *after* the *contempt*, if any had been committed, and was an

55 attempted excuse or palliation for what had taken place. The grand jury is a part of the court; any such question could have been raised before that body, and reported to the court for its action.

This case differs from Ballman *v.* United States, 200 U. S. 186. In that case the witness in fact appeared at the time he was ordered by the court to appear and asserted his privilege within the time allowed him in which to give his testimony. The witness in this case made no claim of privilege, at any time, or in any manner, and the claim as it was finally attempted to be made by counsel was too

late, and not properly asserted. Hale *v.* Henkel, 201 U. S. 43, contains an interesting opinion as to the rights of corporations, and of their officers when called to testify in regard to the transaction of the corporate business and the privilege of a witness is asserted on the ground that the testimony might be incriminating. It is true that the questions raised in that case are analagous to those relating to visitatorial powers which may be exercised by the state granting the charter, and bear upon the right of the government to investigate the conduct of corporations, in proceedings for breach of the Federal statute to protect trade and commerce against unlawful restraint and monopolies. But the discussion is illuminating, as clearly setting forth the duties and obligations of corporations to the public, and the right of the state—and in that case the government—to exact full obedience to all reasonable regulations as to the conduct of their business and full disclosure of all their transactions, in a proceeding in behalf of the government. Certainly in a case like this, where no right of visitatorial powers is claimed or attempted, but the action on the part of the state is limited to
56 requiring the production of evidence for use in state proceedings against other persons, it cannot be held that there has been an undue assertion of authority by the State, over a corporation, which by permission of the state is doing business therein.

In the above case it will be noted, that instead of the corporation being merely called as a witness in a proceeding upon a complaint against others, it was itself being investigated and its employee who appeared refused to produce its books and papers. While in the view we take of this case it does not become necessary for us to decide whether a corporation has the same right in any case as an individual, to assert a claim of privilege, as a witness, against producing its books and papers in a criminal proceeding in behalf of the State, against other persons, we can say at least that before deciding that such a privilege exists in a case like this, we should insist upon its being shown that the assertion of the privilege was made in strict conformity with the law.

We have a statute, regulating the admission of foreign corporations to this State for the purpose of doing business, providing in detail for the necessary steps to be taken before admission. This statute requires a foreign corporation, before doing business here to procure a certificate of registration from the Secretary of State that it has complied with all the requirements of the law to authorize it to do business in this State; stating the business of the corporation and that it is such as may lawfully be carried on by a corporation incorporated under the laws of this State for such or similar business; and to file with the Secretary of State a copy of its charter; state its place of business and stipulate upon whom service of process against it may be made; and other provisions in detail. Act No. 20 of Acts of 1902. Thus placing itself respecting the busi-
57 ness done here, upon the same basis as domestic corporations, as to being subject to the jurisdiction of the courts, under our laws. It has been claimed in argument, that this corporation having been chartered in the state of Maine was not sub-

ject to the law of this State, to the extent of being compelled to produce books and papers which were not then actually in the State. It is understood from the record before us that this corporation had taken all the steps required by statute, to entitle it to admission to this State, and to protection of its laws applying to all foreign corporations so admitted.

No question is made that the service of the order upon it was not in accordance with our statute, relating to the service of process upon foreign corporations doing business in this State. When no question is made that they were not in the State, &c.

Since the respondent was thus doing business in this State, so far as pertained to the business done here and all matters and things connected therewith, it was and is amenable to the laws of the State and in duty bound to obey them the same as if it were a domestic corporation. If, in anticipation of being called as a witness or to produce its books and papers, in some proceeding before the grand jury, upon criminal charges against our own citizens, it saw fit to remove them from this to another state, it should not be permitted to plead its own act, taken for the very purpose of putting them beyond the jurisdiction as an excuse for not obeying a subpœna and producing them. As a body corporate it was in fact doing business, in Vermont and Massachusetts. Taking the books into Massachusetts was merely shifting them from one hand to the other. They were as much in control of the corporation as before. That is the
58 essential thing, and not the precise locality where they happened to be when called for. The corporation was within this jurisdiction, and the books and papers within its control. No corporation, whether foreign or domestic, can evade its testimonial duty, which rests upon it while it is here doing business, by merely sending to the home office, in another state, documents pertaining to said business which are required as evidence in legal proceedings here, and refuse to produce them when required by authority of law. In contemplation of law, they are still in this jurisdiction for such purpose, and in control of the corporation doing business here. They are a part of the business of the corporation which is carried on here. They constitute a record of the transaction of that business and belong here, for all legitimate purposes of evidence, when required by our courts.

The right of control and regulation of foreign corporations coming within the State to do business was fully discussed and maintained in Cook *v.* Howland *et al.*, 74 Vt. 393. See also Osborn & Woodbury *v.* Shawmut Ins. Co., 51 Vt. 278.

At this time in the history of the progress and development of corporate interstate, we should not be inclined to take a backward step as to the rights of the legislature exercised within proper limits, in the control and regulations of corporations, whether foreign or domestic.

In our opinion neither the statute in question nor the order of the court pursuant thereto requiring the production of the documentary evidence mentioned in the order, violate the provision of the constitution of this State. No claim based upon the 4th or 5th

amendment to the Constitution of the United States is made in this court, nor could there be successfully, since those amendments
59 are held to have no reference to the states.

5. The claim is also made that the statute is contrary to the fourteenth amendment of the Constitution of the United States, because it arbitrarily discriminates between artificial and natural persons, denying to the former equal protection of the laws: As before seen, prior to the passage of this Act, an individual could by a *subpœna duces tecum* be compelled to do all, by way of producing books, etc. that a corporation can be forced to do, under the provisions of the statute. This statute seems designed for requiring the corporation itself, as the responsible owner and legal custodian, to produce the documentary evidence mentioned therein, without the necessity of calling upon bookkeepers, managers or other servants who may, or may not in fact, have custody or control thereof, at the time notice to produce is given, and to place upon the corporation the responsibility of seeing that such evidence called for, if in its control, is produced. This accomplishes in a direct way the same object which might require much delay and difficulty to accomplish, without the statute, by a *subpœna duces tecum* served upon such individuals as might be supposed to have the evidence in their custody. The statute leaves the corporation to select such officer, agent or employee as it may see fit, to produce the evidence in compliance with the order made. It authorizes the laying of no unjust burdens upon corporations, as distinguished from individuals, and is designed only to compel the production of admissible testimony, to be used in court. The classification made by the statute placed all corporations, whether domestic or foreign, in one class, leaving individuals, whether acting severally, as co-partners, or as associates, in another class. The general difference existing between natural and artificial persons in this respect, without
60 this statute, makes the classification made a proper one, one that removes the prior discrimination between them, and therefore not in violation of the equality clause of the fourteenth amendment.

6. It is also claimed that the statute in question is in conflict with the fourteenth amendment because it authorizes the court to punish for contempt, in case of refusal to produce such testimony when ordered, as in this case and thus deprive a corporation of its property by way of a fine, without due process of law.

The question of what constitutes due process of law has been so recently and fully discussed in this State, with reference to decisions in Federal and State courts, that further consideration is unnecessary. State *v.* Stimpson, 78 Vt. 124; State *v.* Hodgson, 66 Vt. 134; Bartlett *v.* Wilson, 59 Vt. 23; Hurtado *v.* California, 110 U. S. 516; Hagar *v.* Reclamation Dist., 111 U. S. 701; Turpin *v.* Lemon, 187 U. S. 51.

The respondent's contention in this respect is made upon the ground that it was justified in refusing to produce books and papers which might tend to incriminate it, and that this statute requiring their production is unconstitutional.

This proposition is disposed of by what we have previously said in regard to the necessity for appearance and production of documents by a witness, and claiming the privileges when in court, and that it is not for the witness to decide, as to such documents being privileged but for the court; and as we hold that the claim of privilege was not made as required by law, but that the order was disobeyed, the respondent on common principles stood as a contemnor before the court. The proceedings against it were in accordance with the ordinary mode prescribed by law in such cases and adapted to the end to be attained; the respondent was fully heard re-
61 specting the justice of the judgment sought; and the fine imposed was within the discretion of the court. It cannot be said therefore, that by the fine it was deprived of property without due process of law.

7. The further objection is made that the statute is in violation of the 14th Amendment, because it provides no compensation for time, trouble, and expense in producing documents and papers in other states and bringing them to this State—hence taking of property without due process of law.

By statute witnesses are allowed for travel in the state, and so much a day for attendance upon court. And in state causes extra compensation may be allowed to witnesses called from without the State when their production has been ordered by a judge of the Supreme Court, or by a judge of the county Court presiding at the trial, to prevent a failure of justice; and such judge may order any necessary evidence at the expense of the State, to prevent a failure of justice, and such compensation shall be fixed by the court before whom the trial is had. V. S. 5396.

In practice this statute has very properly been construed as broad enough to cover such witnesses and evidence required before a grand jury. Since the Act in question contains no special provision touching the fees of witnesses coming before a court or grand jury in obedience to an order issued thereunder, the pay of such witnesses, like that of all others, is governed by the general provisions of the statute upon that subject. Whether the fees which may thus be allowed are reasonable compensation for the time, trouble, and expense necessarily involved in complying with such order, we need not inquire. That is a matter resting with the legislative
62 branch of government, not with the judicial. Mr. Sorjeant Hawkins after speaking of the English statute governing witness fees in civil cases, says: "But in criminal proceedings the demands of public justice supercede every consideration of private inconvenience; and witnesses are bou*dn*, unconditionally, to attend the trial upon which they may be summoned, and be bound over to give their evidence. To persons of opulence and public spirit this obligation cannot be either hard or injurious; but indigent witnesses grew weary of expensive attendance and frequently bore their own charges to their great hinderance and loss; * * *" 2 Hawk. P. C. ch. 46 sec. 168. In West *v.* State, before cited, in holding that a witness is bound to obey the process of subpœna in criminal prosecutions without payment or tender of fees, the court of last re-

sort in Wisconsin said: "But in no sense can the requisition upon the citizen of his attendance upon the courts to testify as a witness, be considered as the taking of private property for public use, within the meaning of the constitution. The object of that provision in the fundamental law was to protect the citizen from the grasping demands of government, not to absolve him from any of those various personal duties which every good citizen owes to his country; such as the performance of militia duty, obedience to the call of the proper authority for his personal service in suppressing a riot, the apprehension of a felon, affording assistance to officers in making arrests when resisted, and the like. There are very many instances in which the citizen is required to perform personal service, or render aid to his government, without other compensation than that of his participation in the general good, and his enjoyment of the general security and advantage which result from common acquiescence in such obligations on the part of all citizens
63 alike, and which is essential to the existence and safety of society."

Suppose it be assumed that by reason of inadequate fees, a corporation suffers injury, by way of time, trouble, or expense, consequent on a compliance with an order to produce evidentiary documents in its possession and control, yet its rights guaranteed by the federal constitution are not thereby violated, since the injury is incidental to the legitimate exercise of the powers of government in the interest of public justice and for the public good. While it may be true, strictly speaking, that criminal law, a law which deals with offenses after they have been committed, does not fall within the domain of the police power, a power which aims to prevent offences, (Freund, Police Power, sec. 86). Yet, the law governing incidental injuries, to rights of private property resulting from the exercise of governmental powers, lawfully and reasonably exerted for the public good, is by analogy, much in point. In Chicago, B. & Q. R. Co. *v.* Drainage Comrs., 200 U. S. 561, 50 L. Ed. 596, the opinion of the court being by Mr. Justice Harlan, after a very extended examination of decisions of the Federal Supreme Court, also of the courts of last resort in several of the states, it was held, that "if the injury complained of is only incidental to the legitimate exercise of governmental powers, for the public good, then there is no taking of property for the public use, and a right of compensation, on account of such injury does not attach, under the Constitution. Upon this same question, see also, Village of Carthage *v.* Frederick, 122 N. Y. 268.

We hold therefore, that the statute under consideration is not repugnant to the provisions of the fourteenth amendment
64 in this respect.

It being conceded that the decisive question is as to the jurisdiction of the court, we hold that the court had jurisdiction and we find no error in the proceedings.

The petition for certiorari and the petition for a writ of error are dismissed with costs, the exceptions are overruled with costs,

and judgment that the respondent take nothing by its exceptions, and that execution be done.

65 UNITED STATES OF AMERICA:

Supreme Court of the United States.

CONSOLIDATED RENDERING COMPANY (Original Respondent), Plaintiff in Error,
against
STATE OF VERMONT, by CLARKE C. FITTS, Attorney General (Original Petitioner), Defendant in Error.

Assignment of Errors.

On a final judgment of the Supreme Court of the State of Vermont, holden at Montpelier, within and for the County of Washington, said judgment being entered on the May Term, A. D. nineteen hundred and seven, wherein the said State of Vermont by Clarke C. Fitts, Attorney General, is the petitioner, and the said Consolidated Rendering Company, a corporation duly organized under the laws of the State of Maine and having a usual place of business in Boston, in the Commonwealth of Massachusetts, is respondent.

The said Consolidated Rendering Company assigns as errors under the Constitution of the United States and the amendments thereto in the record of the process and judgment aforesaid, the following, to wit:

First. That the court erred in not sustaining the exceptions
66 of the Consolidated Rendering Company.

Second. That the court erred in overruling the motion to dismiss filed by the Consolidated Rendering Company.

Third. That the court erred in holding that the County Court of Chittenden County, Vermont, had jurisdiction to adjudge the Consolidated Rendering Company to be in contempt of court.

Fourth. That the court erred in holding that the Consolidated Rendering Company was in contempt of court for failing to produce for use before the Grand Jury of Chittenden County, Vermont, books, documents, papers and other memoranda which tended to incriminate said Company, and subject it to criminal prosecution.

Fifth. That the court erred in holding that Act No. 75 of the Vermont Statutes for the year 1906 was not in conflict with the Fourteenth Amendment of the Constitution of the United States.

Sixth. That the court erred in holding that the judgment of the County Court of Chittenden County did not deprive the Consolidated Rendering Company of its property without due process of law in conflict with the Fourteenth Amendment of the Constitution of the United States.

Seventh. That the court erred in not holding Act No. 75 of the Vermont Statutes of the year 1906 unconstitutional and void in that its enforcement against the Consolidated Rendering Company deprived it of its property without due process of law in contravention of the Fourteenth Amendment of the United States Constitution.

Eighth. That the Court erred in holding that Act No. 75
67 of the Vermont Statutes of the year 1906 did not authorize an illegal inquisition and search into the private books, papers and documents of the Consolidated Rendering Company in conflict with the Fourteenth Amendment of the Constitution of the United States.

Ninth. That the court erred in holding that the order to produce, issued by the County Court of Chittenden County, was valid and constitutional.

Tenth. That the court erred in not holding that the order to produce issued by the County Court of Chittenden County was invalid in that it was an illegal invasion of the constitutional rights of the Consolidated Rendering Company in conflict with the Fourteenth Amendment of the Constitution of the United States.

Eleventh. That the court erred in holding valid Act No. 75 of the Vermont Statutes of the year 1906 and the order to produce issued thereunder by the County Court of Chittenden County which required the Consolidated Rendering Company, a corporation organized under the laws of the State of Maine, and having its usual place of business in Boston, Massachusetts, to collect a large number of books, papers, documents and memoranda, all being without the State of Vermont, and to transport them to Burlington in said State for use before the Grand Jury of Chittenden County in a matter in which said Consolidated Rendering Company was not a party, at its own cost and expense, and without any compensation therefor.

Twelfth. That the court erred in holding that the Consolidated Rendering Company was in contempt of court for failing to collect
68 books, papers, documents and memoranda, all of which were without the State of Vermont, and to transport them at its own cost and expense to Burlington in said State of Vermont for use before the Grand Jury of Chittenden County in a matter in which said Consolidated Rendering Company was not a party, or in any way interested.

Thirteenth. That the court erred in holding that Act No. 75 of the Vermont Statutes of the year 1906 did not deprive the Consolidated Rendering Company of the equal protection of the laws in conflict with the fourteenth Amendment of the Constitution of the United States.

Fourteenth. That the court erred in affirming the judgment of the County Court of Chittenden County adjudging the Consolidated Rendering Company to be in contempt of court.

Fifteenth. That the court erred in not holding Act No. 75 of the Vermont Statutes of the year 1906 invalid and unconstitutional because it was an unlawful attempt to extend the process to be issued thereunder beyond the territorial limits of the State of Vermont.

Sixteenth. That the court erred in not entering judgment in favor of the Consolidated Rendering Company.

CONSOLIDATED RENDERING COMPANY,
By Its Attorneys, FREEDOM HUTCHINSON,
ALBERT S. HUTCHINSON.

68½ [Endorsed:] Consolidated Rendering Co., Plaintiff in Error, *vs.* State of Vermont, Defendant in Error. Assignment of Errors.

69 *Citation on Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Vermont, Greeting:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States in the City of Washington, District of Columbia, within thirty days from the date hereof, pursuant to a Writ of Error filed in the Clerk's Office of the Supreme Court of the State of Vermont, wherein the Consolidated Rendering Company, a corporation duly organized under the laws of the State of Maine, and having a usual place of business in Boston, in the Commonwealth of Massachusetts, is plaintiff in error, and you are defendant in error, to show cause, if any there be, why judgment rendered against the said plaintiff in error as in the said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable John W. Rowell Chief Judge of the Supreme Court of the State of Vermont this 14th day of June in the year of our Lord nineteen hundred and seven.

JOHN W. ROWELL,
Chief Judge Sup. Court of Vermont.

70 UNITED STATES OF AMERICA, *District of* ——, *ss:*

I hereby certify that on the — day of —— A. D. nineteen hundred and seven, I served the within citation by —.

——— ———,
United States Marshal.

Service of the within citation is hereby accepted for and in behalf of the State of Vermont, all formal and further service being hereby waived.

Dated at Montpelier, Vermont, this 14 day of June 1907.

CLARKE W. FITTS,
Attorney General of the State of Vermont.

71 [Endorsed:] Citation on Writ of Error.

72 STATE OF VERMONT, *Chittenden County, ss:*

I, C. J. Russell, Clerk of the County of Chittenden and Clerk of the Supreme Court within and for the County of Chittenden, in the State of Vermont, the same being a Court of Record, and having a seal, hereto attached, do hereby certify that I have the custody of the entire record in the cause entitled "*In re* Petition for Contempt *vs.* Consolidated Rendering Company" and that the printed pages hereto prefixed numbered one to thirty-five inclusive, contain and are

a true copy of the entire record and all proceedings in said cause in said Supreme Court of Vermont held in General Term at Montpelier in the County of Washington determined, and that thereto annexed as pages numbered thirty six to Sixty-four, inclusive, is a copy of the opinion of the Supreme Court of Vermont filed in said cause, and that annexed thereto as pages numbered Sixty-five to Sixty-eight inclusive, is an assignment of errors filed by said Consolidated Rendering Company, and that thereto annexed as page numbered sixty-nine, is the original citation issued upon the Writ of Error from the Supreme Court of the United States allowed upon application of said Consolidated Rendering Company.

In testimony whereof, I have hereunto subscribed my official signature, and affixed the seal of said Court, at Burlington, in said County of Chittenden, this 15th day of June A. D. 1907.

[Seal Supreme Court, State of Vermont.]

C. J. RUSSELL, *Clerk.*

Endorsed on cover: File No. 20,767. Vermont supreme court. Term No. 364. Consolidated Rendering Company, plaintiff in error, *vs.* The State of Vermont, by Clarke C. Fitts, attorney general. Filed June 20, 1907. File No. 20,767.

Supreme Court of the United States.

No. 364. October Term, 1907.

Consolidated Rendering Company,
Plaintiff in Error,

vs.

State of Vermont,
Ex rel Clarke C. Fitts, Attorney General,
Defendant in Error.

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT.

Motion to Advance.

The State of Vermont, the defendant in error in above cause, by Clarke C. Fitts, its Attorney General, moves that this cause be advanced upon the Docket of this Court, to be heard and argued at as early a date as can be fixed, convenient to the Court.

Statement of the Case.

The Grand Jury of Chittenden County Court, Vermont, at its September Term, 1906, had under investigation certain charges against the Cattle Commissioners of the State of Vermont, who were charged with having sold diseased meat, for food purposes, contrary to the statute law of Vermont. It was charged that the Cattle Commissioners, acting under the authority of the statute law, had condemned as diseased certain herds of cattle, and had thereafterwards sold said cattle to the plaintiff in error, the Consolidated Rendering Company, a Maine corporation doing a rendering and meat business at Burlington, Vt. The Attorney General of the State caused a subpœna *duces tecum* to be served upon the manager of the plant of the said Rendering Company at said Burlington, requiring him to produce the books, records, memoranda, data and accounts of said Company showing what disposition was made of the cattle purchased from the Cattle Commissioners by the Rendering Company. The manager appeared before the Grand Jury and stated that all the books, papers and documents called for had been forwarded to the home office of the Rendering Company at Boston, in Massachusetts. The officers of the Company at Boston were then requested to produce said books and papers. They refused to do so. Pending the investigation by the Grand Jury, the Legislature of Vermont enacted a law which was approved October 9, 1906, and is number seventy-five (No. 75) of the Acts of the General Assembly of Vermont of 1906, and is entitled An Act to Compel the Production of Books and Papers by Corporations.

The Act provides that any corporation doing business within the State of Vermont, shall, when notice is served upon it therefor, according to the provisions of the Act, produce before any Court, Grand Jury, etc., acting under

the authority of the State, all of the books, documents, memoranda, papers and data which may contain any account of reference to or information concerning any suit . . . charge or subject of inquiry pending or to be heard or determined by such Court, Grand Jury, etc. . . . and which have at any time been made or kept within the State of Vermont and are in the custody or control of such corporation anywhere at the time of service of such notice. The Act provides that notice shall issue from the Court or tribunal from which the production is required, and shall describe in a general way what is required to be produced, and shall state the time when and place where the production is required, and provides for the making of service of the subpœna. The Act further provides that if a corporation shall, without reasonable cause, refuse to comply with the requirements of such notice, it may be punished as for contempt by the Court having jurisdiction in the premises to punish for contempt.

Immediately after this Act took effect, notice was served upon the plaintiff in error to produce on the day named all the books, papers and documents relating to the matter of the transactions between the Vermont Cattle Commissioners and the Consolidated Rendering Company.

On the return day of the notice the Rendering Company did not comply with the requirements of the notice: whereupon report thereof was made by the Grand Jury to the Court, and the Attorney General petitioned the Court that the Company be proceeded against as for contempt. Notice was given to the Rendering Company to appear and show cause why it should not be punished for contempt in the premises. On the return day of the notice the Rendering Company appeared by its counsel and claimed, first: that the papers in question had been destroyed; second: that the Act above mentioned is unconstitutional, in that it violated the provisions of the Vermont Constitution relative to

search and seizure and relative to taking private property without just compensation, and relative to compelling a person to incriminate himself. It was further contended that it violated the fourth, fifth and fourteenth amendments to the Constitution of the United States.

The Court, upon hearing the parties and witnesses, adjudged the Rendering Company guilty of contempt, and imposed upon it a fine of three thousand ($3000) dollars. The Company took the case on exceptions to the Supreme Court of Vermont, which affirmed the judgment of the County Court. Thereupon the cause was brought here by writ of error.

Reasons for this Motion.

The defendant in error contends that no federal question is presented by the plaintiff in error in this cause; that due course of the administration of the law in Vermont requires that it be advanced and disposed of at the earliest reasonable time.

It is further represented that causes now pending in the Courts of Vermont, in which the State of Vermont is a party, require the use of the process provided in the Act in question here, and that the proper investigation of charges of crime and proper regulation and control of corporations by the State of Vermont require an early disposition of this cause, that the constitutionality of the Act herein questioned may be settled.

CLARKE C. FITTS,

Attorney General of Vermont, for Defendant in Error.

Supreme Court of the United States.

OCTOBER TERM, 1907.

No. 364.

CONSOLIDATED RENDERING COMPANY,
PLAINTIFF IN ERROR,

v.

STATE OF VERMONT,
by Clark C. Fitts, Attorney General,
DEFENDANT IN ERROR.

Brief for Plaintiff in Error.

Statement of Facts.

The plaintiff in error was ordered to pay a fine of $3000 for failure to comply with a notice to produce, purporting to be issued under the provisions of a statute of the state of Vermont enacted October 9, 1906, and entitled "An Act to Compel the Production of Books and Papers by Corporations."

The statute reads as follows: —

> "*Section 1.* Any corporation doing business within this state, whether organized under the laws of this or any other state or country, shall, when notice there-

for is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission acting under the authority of this state all of the books, documents, correspondence, memoranda, papers and data which may contain any account of, reference to or information concerning the suit, proceedings, action, charge or subject of inquiry pending before it, or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the State of Vermont and are in the custody or control of such corporation in this state or elsewhere at the time of service of such notice upon it.

"*Section 2.* Any corporation doing business within this state, whether organized under the laws of this or any other state or country, shall, when notice therefor is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission acting under the authority of this state all of the books, documents, correspondence, memoranda, papers and data which may contain any account of reference to or information concerning the suit, proceedings, action, charge or subject of inquiry pending before or to be heard or determined by such court, grand jury, tribunal or commission, and which in any way relate to or contain entries, data or memoranda concerning any transaction within the State of Vermont or with any party residing or having a place of business within the State of Vermont and which are in the custody or control of such corporation in this state or elsewhere at the time of service of such notice upon it.

"*Section 3.* Such notice to produce shall issue from

the court, tribunal or commission before which the production is required, and shall describe in a general way what is required to be produced, and shall state the time when and place where the production is required. Service of such notice shall be made in the same manner as the law provides for the service of a writ of summons upon such corporation and shall give such corporation at least six days' time in which to comply. If such corporation has no officer, agent or attorney to receive service or process as provided by law service of such notice may be made upon the manager of its business within the State of Vermont or the person in charge of its property within this state or upon its attorney within this state or upon the secretary of state in the same manner as the law provides for the service of a writ of summons.

"*Section 4.* If such corporation shall, without reasonable cause, neglect or refuse to comply with the requirements of such notice it may be punished as for contempt by the court having jurisdiction in the premises to punish for contempt. Execution may issue for the collection of such fine as may be imposed for such contempt, which execution shall be served and all proceedings thereunder be governed according to the law relating to service and return of final process issuing from county courts.

"*Section 5.* Upon petition therefor made by the state's attorney of the county in which such judgment for contempt is rendered, or by the Attorney General, the court of chancery may enjoin a corporation which has been adjudged in contempt under section 4 of this act from further exercising its corporate functions within the State of Vermont and shall, if necessary for

the protection of the creditors of such corporation, appoint a receiver to take possession of the property and estate of such corporation situated within this state, which receiver shall take, hold, administer and dispose of such property and estate under the orders and directions of such court of chancery. The said court of chancery or any chancellor may grant a temporary injunction, appoint a temporary receiver or make such other interlocutory orders or decrees as may be required to carry out the provisions of this section.

"*Section 6.* This act shall take effect from its passage.

"Approved October 9, 1906."

The proceedings against the plaintiff in error under this statute began on October 10, 1906, the day after its passage, when a notice, a copy of which appears on page 3 of this record, was served upon its agents in Vermont. This notice reads in substance as follows: —

STATE OF VERMONT,

CHITTENDEN COUNTY, ss.

To the Consolidated Rendering Company, a Corporation organized under the laws of the state of Maine, and doing business at Burlington in said County of Chittenden under the name and style of the Burlington Rendering Company:

By the authority of the state of Vermont you are hereby notified to produce before the grand jury of the said county of Chittenden at the court house in Burlington in said county of Chittenden, on the 17th day of October, 1906, at 10 o'clock in the forenoon, the following books, papers, correspondence, accounts, data, and memoranda, to wit;

All the books of account, loose leaves of books of account, letters, data, copies of letters, accounts, memoranda, copies of bills, statements, and copies of statements, at any time made or kept or had by your company at said Burlington, which contain any account with, statement of, or relating to or concerning any deal or business with any of the following parties since January 1, 1904: Dr. F. A. Rich of Burlington, Vt., Victor I. Spear of Randolph, Vt., Dr. George Stephens, of Hartford, Vt., George H. Terrill of Morristown, Vt., or the cattle commissioners of the state of Vermont, or the state of Vermont; also all books, vouchers, and receipts issued by your company or by any officer or employee of your company at said Burlington, since January 1, 1904, to any of the above-named parties; also all statements, correspondence, data, memoranda, books, vouchers, and receipts made or kept at said Burlington, which relate to the payment by your company to any of the above parties on the following dates, and for the amounts specified opposite each date. (Here follow forty-eight different dates in the years 1905 and 1906.)

All the foregoing to be used as may be legally admissible as evidence before said grand jury, relative to the matter of complaint pending, and then and there to be investigated by said grand jury, in which the said above-named F. A. Rich, Victor I. Spear, George Stephens, and G. H. Terrill are charged with having unlawfully sold diseased meat for food purposes at said Burlington.

On said October 17, 1906, the plaintiff in error produced before said grand jury certain books of account containing accounts, data, and memoranda relative to business transactions with certain of the parties named in the notice, and also certain checks, but nothing else. (Record, p. 6.)

On October 19, 1906, the grand jury of Chittenden county made a written report signed by its foreman (Record, p. 4, bottom, *et seq.*) to the county court, stating, in substance, —

(1) That it appeared from the evidence before the grand jury that F. A. Rich, as one of the cattle commission of the state of Vermont, had sold to the plaintiff in error a large number of carcasses and hides of cattle condemned under the law by said cattle commission since January 1, 1904. (Record, p. 6.)

(2) That a portion of said carcasses have been sold for the purposes and with the expectation that the same was to be used for food purposes, and a portion for fertilizer purposes. (Record, p. 6.)

(3) That the plaintiff in error at its plant in Burlington had kept an accurate account of such carcasses taken and used for food purposes, on slips, memoranda, and data, and that with each transaction there had been made in duplicate, by the employees of the plaintiff in error, a statement or account, all of which, together with the check given in payment of the amount shown by the statement, were kept in the files of the company at Burlington. (Record, p. 6.)

(4) That the above statements, memoranda, checks, and books of account covering the period from January 1, 1904, to July 1, 1906, were removed from the state of Vermont by the plaintiff in error, or its agent, about the time that the investigation of the transactions between the cattle commission and the plaintiff in error was commenced by the state's attorney of Chittenden county. (Record, p. 6.)

(5) That the statements of each transaction, and memoranda relating thereto as filed and kept by the plaintiff

in error, were necessary and important as evidence bearing upon the matter under investigation by the grand jury. (Record, p. 7.)

Accompanying this report of the grand jury, and containing the same statement therein reported, was a petition of the attorney general of Vermont (Record, pp. 10 *et seq.*), praying (Record, p. 12) the Court to summon the plaintiff in error before it, to be dealt with in the premises as for contempt, for neglect, and failure to produce said statements, data, and memoranda.

On October 19, 1906 (Record, pp. 12 *et seq.*), the county court issued a notice for the plaintiff in error to appear before the county court on October 30, 1906, to show cause why it should not be dealt with for contempt.

On October 30, 1906, the plaintiff in error appeared before the county court, and filed a motion to dismiss the petition of the attorney general (Record, p. 16), for the reasons (1) that the memoranda and papers called for were not legally material and competent evidence; (2) because it was sought to compel the plaintiff in error to bring into the state of Vermont, for use before the grand jury, papers and memoranda which may tend to criminate it; and (3) because the statute under which this proceeding was taken was in contravention of the fourth, fifth, and fourteenth amendments of the Constitution of the United States and the tenth and eleventh articles of the constitution of Vermont.

Accompanying this motion to dismiss was an affidavit of the general counsel of the plaintiff in error (Record, p. 17), stating that the papers and memoranda referred to would, if produced in evidence, tend to criminate the plaintiff in error, and render it liable to criminal prosecution.

At the same time, without waiving its rights under the motion to dismiss, the plaintiff in error filed an answer. (Record, p. 17.)

The county court overruled the motion to dismiss, to which action the plaintiff in error duly excepted (Record, p. 2), and, after hearing evidence on the answer, it adjudged the plaintiff in error in contempt of court, and imposed upon it a fine of $3000. (Record, p. 3, top.)

The cause was carried to the Supreme Court of Vermont by the plaintiff in error on its bill of exceptions (Record, p. 2), and a petition for writ of certiorari (Record, p. 21) and a petition for writ of error (Record, p. 25) were also filed in the Supreme Court of Vermont to review the judgment of the county court.

The Supreme Court of Vermont held that the last two proceedings were unnecessary to properly present the questions at issue (Record, p. 26), and the matter was decided by that Court on the bill of exceptions adversely to the plaintiff in error.

This writ of error was thereupon sued out by the Consolidated Rendering Company.

Points involved in the Errors here relied upon.

(1) That the notice to produce was in excess of the authority granted by the statute, and was invalid.

Inflicting a fine upon the plaintiff in error for failure to obey an invalid and unauthorized order deprived it of property without due process of law. (Record, p. 42, first, second, and third assignments; Record, p. 43, ninth and tenth assignments.)

(2) That the statute and notice to produce did not give the plaintiff in error a proper notice, and did not allow it

an opportunity to show cause why the writings requested should not be produced, and so denied it the due process of law secured by the fourteenth amendment. (Record, p. 42, first, second, and third assignments; Record, p. 43, ninth and tenth assignments.)

(3) That the statute is unconstitutional because it undertakes to regulate an owner in the control of its property outside the territorial limits of the state of Vermont. (Record, p. 43, assignment 15.)

(4) That the statute is unconstitutional because it confers judicial functions upon non-judicial bodies, in violation of the due process of law clause of the fourteenth amendment. (Record, p. 42, assignment 5.)

(5) That the statute and notice to produce required the plaintiff in error to produce writings which tended to incriminate it without extending immunity against criminal prosecution.

Inflicting a fine upon the plaintiff in error for failure to produce incriminating writings deprived it of its property without due process of law. (Record, p. 42, first, second, third, fourth, fifth, sixth, and seventh assignments; Record, p. 43, ninth and tenth assignments.)

(6) That the statute and notice to produce authorized an unreasonable search and seizure of the private books and papers of the plaintiff in error.

Inflicting a fine upon it for failure to submit to an unreasonable search and seizure deprived it of property without due process of law. (Record, p. 42, first, second, third, fifth, sixth, and seventh assignments; Record, p. 43, eighth, ninth, and tenth assignments.)

(7) That the statute required the plaintiff in error, a foreign corporation, to collect its books, papers, and other writings without the state of Vermont, and send them

there at its own expense for use in a matter in which the plaintiff in error was not a party and had no interest.

Such a requirement amounted to a taking of property without compensation, in conflict with the due process of law clause of the fourteenth amendment. (Record, p. 43, eleventh and twelfth assignments.)

(8) That the statute, in confining its provisions to corporations, made an arbitrary classification and thus deprived the plaintiff in error of the equal protection of the law secured by the fourteenth amendment. (Record, p. 43, thirteenth assignment.)

Argument and Authorities.

I.

The notice to produce was in excess of the authority granted by the statute, and was invalid.

(*a*) The first part of the notice to produce required the production of ten specified kinds of writings, viz., (1) books of account, (2) loose leaves of books of account, (3) letters, (4) copies of letters, (5) accounts, (6) memoranda, (7) data, (8) copies of bills, (9) statements, (10) copies of statements.

The statute authorized the production of "books, documents, correspondence, memoranda, papers, and data."

So far as the notice required the production of copies, and not original writings, it would seem to be in plain excess of the authority of the statute.

(*b*) The notice required the production of all these ten specified kinds of writings which contained any statement relating to any deal or business with four individuals: F. A. Rich, Victor I. Spear, Dr. George Stephens, George H. Terrill.

It should be observed that the notice is not confined to the production of writings relating to the purchase or sale of diseased meat for food purposes, which was the matter under inquiry, but calls for the production of writings relating to any business whatsoever with these four individuals for a period of two years and ten months.

In this respect the notice is obviously in excess of the power granted by the statute, because it is there provided that the writings demanded must contain some account of, reference to, or information concerning the charge or subject of inquiry pending.

(*c*) The notice also requires the production of all writings showing any deal or business by the plaintiff in error with the cattle commission of the state of Vermont.

This requisition, again, is not confined to writings relating to the matter under investigation, but includes all writings showing any business whatsoever with the commission for a period of two years and ten months.

(*d*) The notice also requires the production of all writings showing any deal or business with the state of Vermont for the same period of time, without any limitation as to the matter under investigation.

This requisition would include corporation returns made by the plaintiff in error as a foreign corporation, tax returns, fertilizer returns, and a mass of correspondence in no way relating to the purchase and sale of diseased meat, the matter under investigation.

(*e*) The notice then requires the production of all books, vouchers, and receipts issued by the plaintiff in error or its employees at Burlington to any of the six

parties mentioned in the notice, for a period of two years and ten months.

This requisition, again, is nowhere confined to books, vouchers, and receipts relating to the sale of diseased meat.

And, furthermore, so far as it relates to the production of books, vouchers, and receipts issued by employees of the plaintiff in error, the requisition is not confined to writings relating to the business of the plaintiff in error.

(*f*) The notice then requires the production of all statements, correspondence, data, memoranda, vouchers, and receipts which relate to the payment of certain specified amounts on forty-eight different days by the plaintiff in error to the six parties above named.

Here there is nothing in the notice to show that the writings thus demanded had anything whatever to do with the matter under investigation.

(*g*) There is nothing in the notice confining the requisition to writings in the custody or control of the plaintiff in error at the time of service, as required by the statute.

For the reasons thus stated it should be held that the notice to produce was invalid.

The statute is a highly penal one.

A corporation failing to comply with a proper and lawful notice is subject to punishment for contempt and may also be enjoined from longer doing business in Vermont.

The whole proceeding was a summary one, and the jurisdiction of the Court to act depended upon a strict compliance with the statute.

Since the statute was not complied with all the proceed-

ings here taken were null and void, and the plaintiff in error was adjudged in contempt without due process of law.

Thatcher v. *Powell*, 6 Wheat. 119:

In this case, at page 127, Chief Justice MARSHALL says, —

> "In summary proceedings where a court exercises an extraordinary power under a special statute prescribing its course we think that course ought to be exactly observed and those facts especially which give jurisdiction ought to appear in order to show that its proceedings are *coram judice*."

See also *Ex parte Fisk*, 113 U.S. 713.
Ex parte Rowland, 104 U.S. 604.
Ex parte Ayers, 123 U.S. 443.
Ex parte Sawyer, 124 U.S. 200.
Ex parte Burrus, 136 U.S. 586.
Re Bonner, 151 U.S. 242.

II.

Neither statute nor notice to produce afforded the plaintiff in error an opportunity to present in Court reasons why the writings demanded should not be produced.

There was no notice or opportunity for a hearing on this question before the notice to produce was issued.

There was no subsequent notice or rule to show cause in Court why the plaintiff in error should not produce before the grand jury the books and documents required from places without the territorial limits of the state of Vermont.

The notice to produce which could be issued under the statute by a non-judicial body in effect pronounced an *ex parte* judgment on the plaintiff in error without hearing

or notice. As stated by the Supreme Court of Vermont, on page 28 of the record, "The Act leaves it for the tribunal to determine what books and papers are needed and may be called for."

The due process of law required by the fourteenth amendment demanded that this important question, affecting the control of the property of the plaintiff in error in another state, should not thus be determined *ex parte* without notice to it, or an opportunity for hearing.

Hovey v. *Elliott*, 167 U.S. 409.
Holden v. *Hardy*, 169 U.S. 366, 389, 390.
Roller v. *Holley*, 176 U.S. 398.

The method of proceeding in this case was novel and totally at variance with the accepted practice sanctioned by long usage in England and in this country relative to the production of documents.

Documents in judicial proceedings have ordinarily been obtained in the following ways: —

(1) By means of a subpœna *duces tecum*.

(2) By means of a bill for discovery in chancery praying for an order for production.

(3) By means of a statutory substitute for a bill of discovery, closely conforming to the requirements of the chancery practice.

If a subpœna *duces tecum* requires appearance and the production of documents in a place other than open Court, the witness has a right to have the question whether he shall answer or produce passed upon by the Court, with opportunity for defence, and an order of the Court to produce before he is in contempt.

On this point Mr. Justice McKENNA says, in —

Hale v. *Henkel*, 201 U.S. 43, at page 80, —

"It [a subpœna] cannot be finally enforced except after a challenge and a judgment of the court on the challenge."

Interstate Commerce Com. v. *Brimson*, 154 U.S. 447, 479.

See also *Counselman* v. *Hitchcock*, 142 U.S. 547.
Brown v. *Walker*, 161 U.S. 591.
Interstate Commerce Com. v. *Baird*, 194 U.S. 25.
Ballman v. *Fagin*, 200 U.S. 186.
Hale v. *Henkel*, 201 U.S. 43.
Nelson v. *United States*, 201 U.S. 92.

In a proceeding by bill for discovery in chancery a defendant has ample opportunity, by demurrer, plea, or answer, to set up any reason for non-production; and no order to produce would be issued until a hearing and decision on the question raised by the defendant's pleadings.

Story, Equity Pleading (10th ed.), secs. 575, 824, *et seq.*
United States v. *Salina Bank*, 1 Pet. 100.

The statutory substitutes which, in many of our states, in the federal courts, and in England, have, to a large extent, superseded bills for discovery, all carefully provide for a hearing on the question whether production is necessary before an order to produce is issued.

See 3 Wigmore, Evidence, p. 2443, note 6, and p. 3014, note 6, for a full citation of statutes.

In the case at bar the process provided by the statute is not a subpœna *duces tecum*.

The statute is entitled "An Act to compel the Production of Books and Papers by Corporations."

The notice does not provide for the attendance of any one as a witness.

The only order which the notice contains is an order to produce.

It is directed, not to an individual, but to a corporation, which, in the nature of things, could not attend as a witness.

Documents belonging to a corporation are produced by subpœna *duces tecum*, directed, not to the corporation, but to the agents or officers of the corporation having the documents requested in their control.

> *Wertheim* v. *Continental &c. Co.*, 15 Fed. Rep. 716.

As stated by Mr. Justice McKenna, in *Nelson* v. *United States*, 201 U.S. 92, at page 116, —

> "It is useless as attempting to demonstrate that twice two make four to say that a corporation can have possession of nothing except by the human beings who are its officers, and it is to them, not the intangible being they represent and act for, that the law directs its process of subpœna and must procure its evidence."

The statutory order in the case at bar, though not a subpœna, is, in its nature, somewhat similar to the statutory proceedings for production which in other states have

superseded the more cumbersome proceeding in chancery by bill for discovery.

It differs, however, from these statutory proceedings and from bills for discovery in these important particulars:

(1) It is not confined to parties to a litigation already pending or to be begun.

(2) It applies to corporations only.

(3) It extends to criminal, as well as civil, cases.

(4) It compels production before non-judicial bodies.

(5) There is no requirement that the documents to be produced shall be legal evidence in the matter under investigation.

(6) The process requiring production may be issued *ex parte* by a non-judicial body and it is a contempt to disobey it.

(7) There is no provision in the statute giving to a corporation immunity from prosecution for producing documents which may incriminate it.

(8) The corporation may in six days' time be required to produce documents from any part of the world.

(9) No opportunity is given, in the statute or in the notice, for the corporation to show cause why production should not be required.

Such a wide departure from established methods of requiring the production of documents, and especially the absence of any provision for a hearing, the extremely short time allowed for production, and the provision making the failure to obey the *ex parte* order of a non-judicial body a contempt, is certainly an invasion of the fundamental rights secured to the plaintiff in error by the fourteenth amendment.

III.

This statute is an attempt by the state of Vermont to limit a corporation in the complete dominion and control of its property situated in another state, although the corporation is not organized under her laws and is not personally within her jurisdiction.

It is elementary that the sovereign powers of a state cannot be exercised beyond her borders.

Thus a statute levying a tax upon property of a corporation in another state or country is unconstitutional and void.

Union Refrigerator Co. v. *Kentucky*, 199 U.S. 194.

Buck v. *Beach*, 206 U.S. 392.

So too a state cannot forbid a citizen or resident from making a contract outside the state although it may affect property within the state.

Allgeyer v. *Louisiana*, 165 U.S. 578, 592.

Nor can a state compel a foreign corporation doing business there to act in the state of its creation as a collector of taxes due in the first state from its own residents.

New York, L.E. & W. R.R. Co. v. *Penn.*, 153 U.S. 628:

In this case Mr. Justice HARLAN says, at page 645, —

> "It [the statute] assumes to do what the state has no authority to do, to compel a foreign corporation to act in the state of its creation. . . ."

Nor can a state court enjoin the continuance of a nuisance in a foreign state.

Mississippi &c. Co. v. *Penn.*, 2 Black, 485.

While a state may impose conditions upon a foreign corporation as a prerequisite of doing business in the state this power is confined to the control of actions within the state.

See the statement of Mr. Justice HARLAN in *New York, L.E. & W. Railroad Co.* v. *Penn.*, 153 U.S. 628, at 646:

> "It does not follow that the state may impose upon foreign corporations because of their doing business in that state with its permission given for a valuable consideration any duty in respect to the mode in which they shall perform their obligations in other states."

In any event the only penalty which a state can lawfully impose upon a foreign corporation for refusal to do an act without the state is to deny it the further right of doing business in the state.

Inflicting a penalty for contempt for failing to perform an act outside the state ordered by a non-judicial body without notice and opportunity for hearing seems clearly beyond the power which a state has to regulate foreign corporations doing business within its borders and in conflict with fundamental rights protected by the fourteenth amendment.

IV.

The statute attempts to confer judicial functions upon non-judicial bodies, in violation of the fourteenth amendment of the United States Constitution.

The constitution of Vermont, as well as the Constitution of the United States, provides that judicial and legislative functions of government shall be forever separate.

Constitution of Vermont, c. 2, sec. 6.

The statute at bar authorizes tribunals and commissions which are non-judicial in character to order the production of books, papers, and documents for use in non-judicial proceedings.

The powers thus bestowed upon tribunals and commissions are judicial in their character.

They cannot be exercised by the legislature itself, much less can they be delegated to a non-judicial body.

This exact point was decided by this court in the case of *Kilbourn* v. *Thompson*, 103 U.S. 168.

> See also *In re Pacific Ry. Com.*, 32 Fed. Rep. 241, at 253.

The general doctrine is concisely stated by Mr. Justice HARLAN in *Interstate Commerce Commission* v. *Brimson*, 154 U.S. 447, at 478, in the following words: —

> "Neither branch of the legislative department, still less any merely administrative body established by Congress, possesses or can be invested with a general power of making inquiry into the affairs of the citizen."

These unconstitutional provisions here are so connected with the general scope of the law as to make it impossible to strike them out and give effect to what remains.

> *Baldwin* v. *Franks*, 120 U.S. 678.
> *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540.

This is apparent from the wide scope of the statute as to production.

The production is not limited to such documents, books, and papers as would be admissible in judicial proceedings.

This indicates that a wider scope for investigation and production was intended to be conferred than if the statute had been confined in terms to production in judicial proceedings.

If the provisions of the statute authorizing production before non-judicial bodies be cut out, it would also be necessary to limit production to such documents and papers as would be admissible in judicial proceedings. (See the carefully worded statute referred to by Mr. Justice BRADLEY in *Boyd* v. *United States*, 116 U.S. 616, at 631.)

This the statute does not do, and since the Court cannot do it by construction, the whole statute should be declared invalid.

United States v. *Reese*, 92 U.S. 214, 221.
Trade Mark Cases, 100 U.S. 82, 98.

V.

The statute and notice required the plaintiff in error to produce writings which tended to incriminate it, without extending immunity against criminal prosecution.

In the report of the grand jury to the county court, which was made a part of the petition of the attorney general to adjudge the plaintiff in error in contempt (Record, pp. 10 *et seq.*), it appeared that the grand jury was investigating a complaint in which F. A. Rich, Victor I. Spear, George Stephens, and G. H. Terrill were charged with having unlawfully sold diseased meat for food purposes.

It also appeared in this report that said Rich had sold to the plaintiff in error a large number of carcasses of cattle condemned by the state cattle commission since January 1, 1904, and that a portion of these carcasses were so sold for

the purpose and with the expectation of being used for food purposes. (Record, p. 14.)

It also appeared in the report that the employees of the plaintiff in error had kept accurate accounts on slips or memoranda of all carcasses sold for food purposes, and it was stated that these accounts were important as evidence of the charge under investigation, *i.e.*, that Rich and others had sold diseased meat to the plaintiff in error for food purposes. (Record, p. 14.)

In his ruling on page 20 of the record, the judge of the county court says, —

> "It appears that these papers at the present would enable the grand jury or any person seeking the facts to trace the history of every animal that was sold to this company by the cattle commission.
>
> "It further appears that without those papers it is impossible to do anything of the kind, to make any approach toward ascertaining and following up the transactions to know just what they were and just what became of the cattle."

The relation of the plaintiff in error to the subject of inquiry, as thus outlined, plainly showed to the Court that the production of the accounts mentioned in the report, and of other writings demanded by the notice to produce, might tend to incriminate it and subject it to prosecution on the same charge as that then under investigation, *i.e.*, the unlawful sale of diseased meat for food purposes.

Counselman v. *Hitchcock*, 142 U.S. 547.
Ballman v. *Fagin*, 200 U.S. 186.

This claim to protection against self-incrimination was set up by the plaintiff in error at its first opportunity.

Until cited to appear and show cause why it should not be dealt with for contempt no process had issued requiring its appearance in Court or elsewhere.

The only order which had been made was a notice to produce before the grand jury, and this did not purport to require the personal attendance of any one either before that tribunal or before the Court.

Even if the notice had contained an order for the plaintiff in error to appear before the grand jury, no question of law in reference to self-incrimination could properly have been raised before that body.

Ballman v. *Fagin*, 200 U.S. 186.
Ex parte Wilson, 39 Tex. Crim. 630.

In the latter case, where a witness who had refused to answer a question before the grand jury, not then claiming any privilege against self-incrimination, later asserted it in Court, it is said, at pages 636, 637, —

> "The grand jury has no authority itself to punish the witness for contempt.
>
> "It could only refer the matter to the district judge. . . . When the witness refuses to testify he is brought before the judge . . . and it is then the duty of the judge to determine from the nature of the question and the surroundings whether or not the answer of the witness will tend to incriminate him."

Moreover, if the statute and notice had required the presence of a testifying witness before the grand jury, such witness could not claim the privilege against self-incrimination on behalf of the corporation.

Hale v. *Henkel*, 201 U.S. 43.

Actual production of books and papers is never required when it is apparent from material already before the Court that self-incrimination is possible.

In the following cases the claim was sustained, although no books and documents were produced: —

Ballman v. *Fagin*, 200 U.S. 186.
Logan v. *Railroad Co.*, 132 Pa. St. 403, 408.
Boyle v. *Smithman*, 146 Pa. St. 255.
Ex parte Wilson, 39 Tex. Crim. 630.

In a bill for discovery of documents the right not to produce may be asserted by a demurrer when it appears on the face of the bill that incrimination is liable.

Story, Equity Pleading (10th ed.), sec. 575.

The objection may also be taken by a plea in bar or by answer.

United States v. *Salina Bank*, 1 Pet. 100.

The whole proceedings here taken under the statute were, in effect, proceedings to compel discovery.

Following well-established practice in analogous cases so far as the anomalous method of procedure here enabled, the plaintiff in error set up its objection to discovery by a statement supported by affidavit, which was in substance and effect a demurrer or plea in bar, although entitled a motion to dismiss.

The Vermont courts have refused to entertain this conclusive constitutional objection to the statute for the following reasons: —

(1) Because the plaintiff in error had not raised this

difficult question of law before a body which had no power whatever to deal with it.

(2) Because no witness in Court had claimed the right on behalf of this company, and this too in spite of the ruling of this Court in *Hale* v. *Henkel* that such right cannot be asserted on behalf of a corporation by a witness, and in spite of the further fact that no witness had at any time been summoned to appear in Court for that or any other purpose.

If substantial constitutional rights can be thus defeated by mere technicalities they become matters of sound and form, and not of substance.

The statute, since it contains no immunity clause, is in plain contravention of the tenth article of the Vermont constitution, which is substantially the same as the fifth amendment of the United States Constitution.

Counselman v. *Hitchcock*, 142 U.S. 547.
Emery's Case, 107 Mass. 172.
State, ex rel. Attorney General, v. *Simmons & Co.*, 109 Mo. 118.
In re Cullinan, 82 App. Div. 445 (N.Y.)
See also *Ex parte Clarke*, 103 Cal. 352.
Ex parte Cohen, 104 Cal. 524.
Lamson v. *Boyden*, 160 Ill. 613.
Ex parte Carter, 166 Mo. 604.
Smith v. *Smith*, 116 N.C. 386.
People v. *Forbes*, 143 N.Y. 219.
People v. *O'Brien*, 176 N.Y. 351.
Logan v. *R.R. Co.*, 132 Pa. St. 403, 408.
United States v. *Lead Co.*, 75 Fed. Rep. 94.

For the same reason the statute is in conflict with the fourteenth amendment of the United States Constitution.

That amendment prohibits the infringement of fundamental rights by state action, whether legislative, executive, or judicial.

The right to be protected against self-incrimination is a fundamental right so protected. On this point Mr. Justice BRADLEY says, in *Boyd* v. *United States*, 116 U.S. 605, at 631, —

> "Any compulsory discovery by extorting the party's oath or compelling the production of his private books and papers to convict him of crime . . . is contrary to the principles of a free government."

See also *West* v. *Louisiana*, 194 U.S. 258, 262, 263. *Jack* v. *Kansas*, 199 U.S. 372, at 380.

In Iowa the state constitution contains no provision against self-incrimination, but there is a provision that no person shall be deprived of life, liberty, or property without due process of law.

In the case of *State* v. *Height*, 117 Iowa, 650, it was decided that a person who was obliged to incriminate himself against his will, and was thereby convicted of crime, was deprived of his liberty without due process of law in contravention of the provision in the state constitution.

There should be a similar holding under the fourteenth amendment.

The fourteenth amendment applies to corporations as well as to individuals.

Pembina Consol. Silver Min. & Mill. Co. v. *Penn.*, 125 U.S. 181.

Missouri P. R. Co. v. *Mackey*, 127 U.S. 205.
Gulf C. & S. F. Ry. Co. v. *Ellis*, 165 U.S. 150.

There is nothing in *Hale* v. *Henkel*, 201 U.S. 43, opposed to the claim here made; in that case the corporation itself was under examination and not merely requested to produce documents for use in another investigation, as here.

The privilege against self-incrimination was extended to corporations in the following cases: —

Logan v. *Railroad Company*, 132 Pa. St. 403, 408.
State v. *Simmons &c. Co.*, 109 Mo. 118.

VI.

The statute and notice to produce authorized an unreasonable search and seizure of the private books and documents of the plaintiff in error.

As already pointed out, the notice called for the production of a mass of material from six different parties, and for a period of two years and ten months.

The documents requested were not described with the particularity required in the description of documents necessary to a search warrant or subpœna.

The demand in several particulars was in plain excess of the authority granted by the statute.

The demand was not confined to matters relevant to the issue under investigation, nor to evidence admissible in judicial proceedings.

The documents demanded were all without the jurisdiction of the state of Vermont.

There was no provision for compensating the plaintiff in error for the expense of sending the documents to Vermont.

There was no immunity from prosecution.

The plaintiff in error has no interest in the matter under investigation.

Such a requisition is clearly an unreasonable search and seizure within the meaning of the fourth amendment of the United States Constitution.

Boyd v. *United States*, 116 U.S. 616.
Hale v. *Henkel*, 201 U.S. 43.

See also *In re Pacific Railway Com.*, 32 Fed. Rep. 241.
Ex parte Clarke, 103 Cal. 352.
Lester v. *People*, 150 Ill. 408.
Ex parte Brown, 72 Mo. 143.
State v. *Davis*, 117 Mo. 614.
Corson v. *Hawley*, 82 Minn. 204, 214.
Newberry v. *Carpenter*, 107 Mich. 567.

In the Boyd case the order requiring the production of a single paper was held to be an unreasonable search and seizure.

In *Hale* v. *Henkel* a subpœna *duces tecum* not so wide in scope as the notice here in question was held to constitute an unconstitutional search and seizure.

It is difficult to conceive of a statute or an order which could give a more unlimited right to extort from a person all his private books and papers than the one at bar — not after due and proper hearing before a court of justice, but on the mere *ex parte* request of a non-judicial investigating tribunal.

Of such radical practices the Court of Appeals of New York, in the case of *People* v. *O'Brien*, 176 N.Y. 253, at 267, fittingly speaks as follows: —

> "The methods of the seventeenth century were long since abandoned but the desire to elicit from a suspected or accused person evidence that would send him to cell or the scaffold unfortunately survives and this court has in recent years been called upon to condemn on several occasions modes of procedure having that end in view."

This requisition was also in conflict with the fourteenth amendment.

The right to be free from unreasonable searches and seizures is a fundamental right essential to the principles of a free government and protected from state encroachment by the fourteenth amendment.

Boyd v. *United States*, 116 U.S. 616.
West v. *Louisiana*, 194 U.S. 258, 262.
Jack v. *Kansas*, 199 U.S. 372, 380.
Re Pacific Ry. Com., 32 Fed. Rep. 241.
State v. *Height*, 117 Iowa, 650.

In *Re Pacific Ry. Commission*, 32 Fed. Rep. 241, Mr. Justice FIELD says, at page 250, —

> "Of all the rights of the citizen, few are of greater importance or more essential to his peace and happiness than the right of personal security, and that involves not merely protection of his person from assault, but exemption of his private affairs, books, and papers from the inspection and scrutiny of others.

> Without the enjoyment of this right all others would lose half their value."

This right is secured to a corporation as well as to a natural person.

Hale v. *Henkel*, 201 U.S. 43, at 75.

VII.

The statute provides no compensation for the time, trouble, and expense imposed upon a corporation in a foreign state or country of collecting and sending the documents demanded to the state of Vermont.

The statute compels the plaintiff in error to incur expense and trouble in a matter in which it has no interest and in reference to its own property in another state.

Such a requirement is, in substance, a taking of property without just compensation, and, furthermore, the taking is not in Vermont, but outside her limits, where the expense is incurred and the labor performed.

In *Chicago &c. Ry. Co.* v. *Illinois*, 200 U.S. 561, at 595, Mr. Justice HOLMES says, —

> "I suppose it to be plain . . . that if any expense is thrown upon the railroad unlawfully its property is taken for public use without due compensation."

And in the same case Mr. Justice BREWER says, at page 599, —

> "If it be a principle of natural justice that private property shall not be taken for public purposes without just compensation is it not equally a principle of

> natural justice that no man shall be compelled to pay out money for the benefit of the public without any reciprocal compensation? What difference in equity does it make whether a piece of land is taken for public uses or so many dollars for like purposes?"

It is settled law in this Court that a taking of private property by a state without compensation is wanting in the due process of law required by the fourteenth amendment.

> *Missouri Pac. Ry.* v. *Nebraska*, 164 U.S. 403.
> *Chicago Ry. Co.* v. *Chicago*, 166 U.S. 226.

The Supreme Court of Vermont undertook to remove this objection by the assumption that the general law in reference to the compensation of witnesses applied to this statute.

The complete answer to this suggestion seems to be that neither the statute here in question, which was entitled "An Act to compel the production of Books and Papers by Corporations," nor the notice, required the attendance of any one as a witness, but was merely an order for production, for which no compensation was provided, either by the statute or under the general law.

VIII.

The statute is confined in its operation to corporations. An arbitrary classification is thus established, and the plaintiff in error is deprived of the equal protection of the law secured by the fourteenth amendment.

The classification created by this statute is a purely arbitrary one and in conflict with the principles laid down by this Court in *Gulf &c. Ry.* v. *Ellis*, 165 U.S. 150, where it is said by Mr. Justice BREWER,—

> "It is apparent that the mere fact of classification is not sufficient to relieve a statute from the reach of the equality clause of the fourteenth amendment and that in all cases it must appear not only that a classification has been made, but also that it is one based upon some reasonable ground — some difference which bears a just and proper relation to the attempted classification — and is not a mere arbitrary selection."

A classification, to be justifiable under the fourteenth amendment, must bring within its influence all who are under the same conditions.

Where evils sought to be remedied are incident to individuals as well as corporations, laws applicable only to corporations are clearly unconstitutional.

> *Johnson* v. *Goodyear Mining Co.*, 127 Cal. 4.
> *Quarries Co.* v. *Bough*, 80 N.E. Rep. 529 (Ind. 1907).
> *Ballard* v. *Mississippi Cotton Oil Co.*, 81 Miss. 507, 569.

Such is the situation in the case at bar, as the following illustration will clearly show: —

(1) The A corporation, organized under the laws of Massachusetts, and having its principal business there, owns and operates a factory in Vermont through agents residing there.

(2) B and C are copartners owning and operating the same kind of a factory in Vermont through agents residing in Vermont, but themselves living in Massachusetts.

(3) D is an individual owning and operating the same kind of factory in Vermont, through resident agents, but himself living in Massachusetts.

There is an investigation by a Vermont grand jury of the conduct of certain men who have had similar business dealings with all three of the Vermont factories, of the A company, of the B and C copartnership, and of the individual D. The books and papers relating to such transactions are desired for use before the grand jury, and they are all outside the state, at the respective home offices in Massachusetts.

Under this statute the A corporation can be compelled to produce, but partnership B and C, and individual D, who hold similar documents under exactly similar conditions, are not in any way affected by the statute.

This Court has said, in *Missouri* v. *Lewis*, 101 U.S. 22, at 31, that the guaranty of the equal protection of the laws means —

> "That no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances."

See also *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540.

Under the doctrine of these cases, there is no justification for the discrimination of this statute, which places a burden upon corporations having documents in its possession outside of Vermont, while it does not have any effect whatever upon individuals and partners having similar documents in their possession under precisely similar circumstances.

Respectfully submitted,
FREEDOM HUTCHINSON,
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Attorneys for Plaintiff in Error.

Office Supreme Court, U. S.
FILED.
NOV 29 1907
JAMES H. McKENNEY,
CLERK.

Supreme Court of the United States

CONSOLIDATED RENDERING COMPANY
Plaintiff in Error

vs.

STATE OF VERMONT
Ex rel. Clarke C. Fitts, Attorney General
Defendant in Error

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

No. 364. October Term, 1907

BRIEF FOR APPELLEE

CLARKE C. FITTS
ATTORNEY GENERAL

Supreme Court of the United States

No. 364 — October Term, 1907

Consolidated Rendering Company
Plaintiff in Error

vs.

State of Vermont
Ex rel. Clarke C. Fitts, Attorney General
Defendant in error

WRIT OF ERROR TO THE SUPREME COURT OF THE STATE OF VERMONT

BRIEF FOR APPELLEE

THE LAW OF VERMONT

The notice to produce books and papers, failure to comply with which is the basis for these contempt proceedings, was issued under provisions of Act No. 75 of the Acts of the General Assembly of Vermont of 1906. The Act reads as follows:

"Section 1. Any corporation doing business within this

state, whether organized under the laws of this or any other state or country, shall, when notice therefor is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission, acting under the authority of this state, all of the books, documents, correspondence, memoranda, papers and data, which may contain any account of, reference to or information concerning the suit, proceedings, action, charge, or subject of inquiry pending before or to be heard or determined by such court, grand jury, tribunal or commission, and which have at any time been made or kept within the state of Vermont, and are in the custody or control of such corporation in this state or elsewhere at the time of service of such notice upon it.

"SEC. 2. Any corporation doing business within this state, whether organized under the laws of this or any other state or country, shall, when notice therefor is served upon it according to the provisions of this act, produce before any court, grand jury, tribunal or commission, acting under the authority of this state, all of the books, documents, correspondence, memoranda, papers and data, which may contain any account of, reference to or information concerning the suit, proceedings, action, charge, or subject of inquiry pending before or to be heard or determined by such court, grand jury, tribunal or commission, and which in any way relate to or contain entries, data, or memoranda concerning any transaction within the state of Vermont, or with any party residing or having a place of business within the state of Vermont, and which are in the custody or control of such corporation in this state or elsewhere at the time of service of such notice upon it.

"SEC. 3. Such notice to produce shall issue from the court, tribunal or commission before which the production is required, and shall describe in a general way what

is required to be produced and shall state the time when and place where the production is required. Service of such notice shall be made in the same manner as the law provides for the service of a writ of summons upon such corporation, and shall give such corporation at least six days' time in which to comply. If such corporation has no officer, agent or attorney to receive service of process as provided by law, service of such notice may be made upon the manager of its business within the state of Vermont or the person in charge of its property within this state or upon its attorney within this state or upon the secretary of state, in the same manner as the law provides for the service of a writ of summons.

"SEC. 4. If such corporation shall, without reasonable cause, neglect or refuse to comply with the requirement of such notice, it may be punished as for contempt by the court having jurisdiction in the premises to punish for contempt. Execution may issue for the collection of such fine as may be imposed for such contempt, which execution shall be served, and all proceedings thereunder be governed according to the law relating to service and return of final process issuing from county courts.

"SEC. 5. Upon petition therefor made by the state's attorney of the county in which such judgment for contempt is rendered, or by the attorney general, the court of chancery may enjoin a corporation which has been adjudged in contempt under section 4 of this act from further exercising its corporate functions within the state of Vermont, and shall, if necessary for the protection of the creditors of such corporation, appoint a receiver to take possession of the property and estate of such corporation situated within this state, which receiver shall take, hold, administer, and dispose of such property and estate under the orders and directions of such court of chancery. The said court of chancery or any chancellor

may grant a temporary injunction, appoint a temporary receiver or make such other interlocutory orders or decrees as may be required to carry out the provisions of this section.

"SEC. 6. This act shall take effect from its passage."

"Approved October 9, 1906."

There is no general statutory provision in Vermont for the issue of *subpœna duces tecum*. It, therefore, generally rests upon the common law.

A notice issued under the provisions of that Act is in effect a writ of *subpœna duces tecum*. It is apparent that the first four sections of the Act were passed to supply a possible deficiency in the common-law process relative to the production of documentary evidence by a corporation in cases where there is no person within the jurisdiction having custody or control thereof. The Act in its general scope is declaratory of the common law. Process issues substantially like a *subpœna duces tecum:* service is made upon the corporation as a writ of summons is served. Proceedings for contempt are by the law made to conform to like proceedings under the common law. Every essential element of contempt of a *subpœna duces tecum* is required to be established by section four of the Act.

The power to punish for contempt is inherent in courts of law.

Bessette v. *Conkey*, 194 U. S. 324.
In re Debs, 158 U. S. 564–599.
Cartwright's case, 114 Mass. 230–238.

Section five has no relation to nor effect upon this proceeding. It simply empowers the Court of Chancery to deal with the contemptor in another proceeding, one to protect the State and its citizens against a corporation, which has by due process of law been adjudged in contempt of the judicial process of the commonwealth.

Statutes of this character are not entirely new. Stat. 22 Vict. sec. 20, empowered the court or judge having authority under the Act, to compel the production of any writings or other documents named in the order therefor, before a commission to take testimony, etc.: any such order to be enforced, and any disobedience thereof punished in like manner as in case of an order made in court.

In

Campbell v. *Dalhousie*, 22 Law Times Reports, 880,

a petition for further orders on a proceeding under above statute, Lord CAIRNS observes:

> "It appears to me that your Lordships must deal with it just as if there had been a *subpœna duces tecum* in the first instance, and you were called upon to take some further steps in consequence of the disobedience to the *subpœna duces tecum*."

The New York statute (Gilbert's Annotated Code) provides in sec. 867:

That persons must produce books of account, etc., upon "an *order* or *subpœna duces tecum*." It prescribes the manner and length of notice.

Section 868 reads:

> "The production, upon a trial, of a book or paper belonging to or under control of a corporation, may be compelled in like manner as if it were in the control of a natural person. For that purpose a *subpœna duces tecum or an order*, made as prescribed in the last section, as the case requires, must be directed to the president or other head of the corporation, or to the officer thereof in whose custody the book or paper is."

Section 869 provides that in a case specified in the last

section . . . the *subpœna duces tecum or order* is deemed to be sufficiently obeyed if the book or paper is produced.

In both the English and New York statutes quoted, it will be noted that the requirements of the *subpœna duces tecum* is varied in that the production of the documentary evidence need not be by a witness or in connection with oral testimony. There is just that distinguishing feature in the notice to produce under our statute.

A precedent under the New York law above cited is

Fenlon v. *Dempsey*, 21 Abb. N. C. (N. Y.) 291,

a motion to punish a corporation for contempt for failure to produce books, etc., as required by an order. The officers of the corporation answered that "they have not now" the books in their control. It appeared that they had lately had them. The Court adjudged the officers guilty of contempt. It will be noted that the excuse given is much like that made by the respondent here.

THE NATURE OF THE PROCESS

A *subpœna duces tecum* is a writ of compulsory obligation. A leading case is

Amey v. *Long*, 9 East, 475,

a suit against a sheriff's bailiff for failure to produce a warrant as required by a *subpœna duces tecum*. Lord ELLENBOROUGH, C. J., says:

> "The right to resort to means competent to compel the production of written as well as oral testimony seems essential to the very existence of a court of common law. It proceeds and acts upon both descriptions of evidence, and could not possibly proceed with due effect without them.

> But it is not possible to conceive that such courts should have immemorially continued to act upon both, . . . if they had been furnished with no better means of obtaining written evidence than what the immediate custody of the party who was interested in its production, or the favor of those in whose custody it might be, afforded."

Held that the *subpœna duces tecum* is a writ of compulsory obligation.

Corser v. *Dubois*, 3 Eng. Com. Law Rep. 101.

In

Bull v. *Loveland*, 10 Pick. (Mass.) 9,

the Court says:

> "There seems to be no difference in principle between compelling a witness to produce a document in his possession in a case where a party calling for it has a right to use it, and compelling him to give testimony, when facts lie in his own knowledge. It has been decided, though formerly doubted, that a *subpœna duces tecum* is a writ of compulsory obligation which the Court has power to issue, and which the witness is bound to obey, and it will be enforced by proper process to compel production of a paper when the witness has no lawful or reasonable excuse for withholding it."

In

Lane v. *Cole*, 12 Barb. (N. Y.) 680,

an action to recover damages against the defendant for neglect to obey a *subpœna duces tecum* the Court exhaustively discusses the writ, and the New York statute giving a party an action for damages against a person neglecting to obey such a subpœna. The Court says:

"Our statute is in affirmance of the common-law remedy in such cases." *Held*, the plaintiff could recover.

The common law is the law of Vermont, except as changed by statute.

Vermont Statutes, sec. 898.

Where a witness is within the jurisdiction of the Court issuing the subpœna, he may be compelled to produce books and papers, if they are within his control, though the physical location thereof may at the time be without the jurisdiction.

Bank v. *State Bank*, 3 Cliff. 201.
Wigmore on Evidence, 2200.

The Plaintiff in Error Was Present in the State of Vermont When the Process Was Served Upon It

The report of the Grand Jury (Page 4 of Record) sets forth that the plaintiff in error was then, and had been during the period covered by the report, doing business at Burlington, Vermont. The petition of the Attorney General (Page 10 of Record) makes the same allegation. The answer of the plaintiff in error (Page 17 of Record) substantially admits those allegations. Neither the motion to dismiss (Page 16) nor the answer (Page 17) make any issue of fact on that point.

The service of the notice to produce and of the order to show cause in the contempt proceeding, was made, as the law of Vermont provides, by delivery of a copy to the Manager of the plaintiff in error, whose business was at Burlington, and by delivery of duplicate copies to the Secretary of State.

Vermont Statutes, secs. 1098, 4166, 4169.
(See Page 15 of Record.)

"SEC. 898. So much of the common law of England as is applicable to the local situation and circumstances, and is not repugnant to the constitution or laws, shall be law in this state, and courts shall take notice thereof and govern themselves accordingly."

Act No. 20 of the Acts of the General Assembly of Vermont of 1902 provides that no foreign corporation shall do business in the State of Vermont without having first procured from the Secretary of State a certificate that it has complied with all the requirements of law to authorize it to do business in the state.

The same act provides that every foreign corporation shall before such certificate is granted file with the Secretary of State a statement designating a person residing in the state upon whom process against the corporation may be served, and that in case of failure so to do, or upon death or removal of the person so designated, process shall be served by delivery of duplicate copies to the Secretary of State.

The plaintiff in error resided in Maine, but it was doing business in Vermont, and was present in Vermont.

Railroad Co. v. *Koontz,* 104 U. S. 11, 12.
Blake v. *McClung,* 172 U. S. 258, 261.
Insurance case v. *Francis,* 11 Wall. 210.

THE DEFENCE IN FACT

The answer filed by the plaintiff in error to the original plea in these proceedings (Page 17 of Record) puts its defence on the ground that the books and papers in question had been destroyed before the service of process upon it. The Court found (top of Page 21 of Record) that the books and papers were in the possession of the Company in Burlington, Vermont, and were taken away from Burlington shortly prior to the service of notice, and fails to find that they were not then in the custody and control of the Company so that they could be produced. The explanation of the officers and employees of the Company failed to impress the trial court as truthful. That court found that the papers were very material to the matter under investigation. The Record shows that they were. The character of the papers is shown by the samples attached to the Grand Jury's report (Pages 7 to 11 of Record). The matter under investigation was what disposition the Cattle Commissioners of the State of Vermont had made of condemned cattle. The nature and scope of the investigation appears in the Grand Jury's report on page 6 of Record. The Cattle Commissioners were charged with unlawfully having sold diseased meat for food purposes. It appeared from the testimony of the General Manager of the main office of the plaintiff in error, that by the papers called for every animal taken to the Rendering Company's plant by the State Commissioners could be traced.

As the trial court suggests in its findings (Page 18 of Record),

"they are unquestionably corroborative evidence to corroborate testimony of witnesses who knew about the transaction and took part in it."

The Statute authorizes the call for "books, documents, correspondence, memoranda, papers and data." The process in this case called for "books of account, loose leaves of books of account, letters, copies of letters, accounts, memoranda, data, copies of bills, statements and copies of statements," all as particularly specified. Also all "books, vouchers, receipts," and "all statements, correspondence, data, memoranda, books, vouchers and receipts," relating to the specific transactions named.

It did not require the Plaintiff in Error to make any copies of letters, or bills, or statements. It called for only such as had been before that made or kept or were had by the Company at Burlington. The production of correspondence must of necessity include the copies of letters sent as well as the original letters received. The call for statements and bills must of necessity include copies of those sent, if copies are preserved, as well as originals received.

The notice to produce gives as much detailed information as could have been possible under the circumstances, relative to the particular books and papers required. It named the persons with whom the transactions were had; it gave the date or period for which information was sought. It stated that the books and papers called for were to be used, so far as they might be "legally admissible as evidence" before the grand jury. (See pages 3 and 4 of Record.)

It is to be noted that neither in the motion to dismiss (Page 16 of Record) nor in the answer (Page 17 of Record) does the plaintiff in error complain that it cannot identify the papers called for. It did produce the books of account and the checks and vouchers and a few of the bills or statements. (See Pages 6 and 7 of Record.) It admits in its answer (Page 17 of Record) that it had, previous to August 20, 1906, kept and filed at

Burlington "certain papers or memoranda similar to the papers attached to the petition."

Its defense is, we repeat, that the papers and memoranda had been destroyed, "*Wherefore* said company was unable to produce the same at the time of service of the said notice upon it." (Top of Page 18 of Record.)

The question whether the notice in its scope goes beyond the Statute and as to whether the books and papers called for would be legally admissible is one for the State court alone.

> "It is within the established power of the State to prescribe the evidence which is to be received in the courts of its own government."
>
> *Adams* v. *New York*, 192 U. S. 599.
> *Fong Ting* v. *United States*, 149 U. S. 698, 729.

FINDING OF COURT BELOW CONCLUSIVE

This Court will not review the findings of facts of the Court below.

> "Every fact found by a Court in a proceeding for contempt is to be taken as true, and every intendment is to be made in favor of its record, if it appears within the jurisdiction of the Court."
>
> 1 Grant C. S., Pa. 453.
> *Water Co.* v. *Court of Fresno Co.*, 93 Cal. 139.

> "Since the power to punish for contempt is a discretionary power, contempt proceedings are not reviewable on appeal."
>
> *Clark* v. *People* (Ill.), 12 Am. Dec. 177.
> *Cochran* v. *Ingersoll*, 73 N. Y. 613.
> *Tyler* v. *Hammersley*, 26 Am. Rep. 471.

Hunter v. *State*, 6 Ind. 423.
Hayes v. *Fischer*, 102 U. S. 121.
Century Digest, Vol. 10, pp. 2587–2590.
Vials v. *Burton*, 27 Vt. 60.
See also *In re Cooper*, 32 Vt. 262.

The Court of last resort of the State of Vermont, has held that the statute in question violates no provision of the State constitution. (Pages 27 to 38 of Record.)

This Court is bound by the decision of the State Court as to the State statute and constitution.

Jack v. *Kansas*, 199 U. S. 379.
Smiley v. *Kansas*, 196 U. S. 447.

THE FEDERAL QUESTION

There is left, therefore, for this Court to consider, whether the statute in question violates the provisions of section 1 of the Fourteenth Amendment to the Constitution of the United States. A corporation is not a citizen, so this Court has repeatedly held.

Paul v. *Virginia*, 8 Wall. 168.

So only the last two clauses of section 1 of the Fourteenth Amendment are in question here.

Does the Fourteenth Amendment protect citizens from search and seizure under State law and proceeding, and from being compelled to self-incrimination, and from giving private property for public use without just compensation?

The Fourth and Fifth Amendments to the Federal Constitution do not reach proceedings under the authority of the State governments.

Jack v. *Kansas*, *supra*.

The Fifth Amendment provides that "no person . . . shall be deprived of life, liberty, or property, without due process of law." When Congress proposed, and the States adapted, the Fourteenth Amendment, that provision of the Fifth Amendment was incorporated. It was clearly intended thereby to extend the Federal power, to that extent, over the authority of the States. It could not have been intended that that clause carried with it the other provisions of the Fifth Amendment or those of the Fourth Amendment. The clause cannot mean one thing in one place and have an intent vastly more comprehensive in another. Had it been intended to extend the Federal protection against unreasonable search and seizure and to the protection of persons against self-incrimination, and to protect private property from being taken for public use without just compensation, why were not provisions expressing that intent incorporated in the Fourteenth Amendment?

This Court, in

Jack v. *Kansas*, 199 U. S. 380,

assumed for the purpose of that case and to dispose of the question then before it, that if the State statute in question there failed to give immunity from prosecution or punishment, it would violate the Fourteenth Amendment, and that imprisonment by virtue of the statute would be depriving a person of his liberty without due process of law. It does not decide that the Fourteenth Amendment goes that far. The proceedings of the State court were there upheld with the assumption made. But, so far as we are able to find, this Court has not yet said that the "due process of law" clause of the Fourteenth Amendment means any more than in the Fifth Amendment except that it reaches to the authority of the states.

Mr. Justice DAY says, in *Adams* v. *New York*, 192 U. S. 594:

"We do not feel called upon to discuss the contention

that the Fourteenth Amendment has made the provisions of the Fourth and Fifth Amendments to the Constitution of the United States, so far as they relate to the right of the people to be secure against unreasonable searches and seizures and protect them against being compelled to testify in a criminal case against themselves, privileges and immunities of citizens of the United States of which they may not be deprived by the action of the States."

But assuming that the Fourteenth Amendment goes that far, its provisions are not violated by the statute and proceedings here in question.

Question of Incrimination is for the Court

Rapalje on Contempt:

"SECTION. 63. There is no doubt of the power of Courts or Record to compel by writ of *subpœna duces tecum* the *bringing into court* by the witnesses, all books and papers of which he has control, and the inspection of which is deemed essential to the proper determination of the issues presented for trial. But the office of the writ stops here. It has no effect upon the question of admissibility of the books and papers so brought in, as evidence in the case. From the mere fact that the witness has brought the documents into the court room, in response to the requirements of the writ, it does not follow that he must produce them in evidence: that is a matter lying *within the discretion of the Court.* . . . If a witness has a lawful or reasonable excuse for withholding the documentary evidence, he will not be compelled to produce it: *but of the lawfulness or reasonableness of the excuse the Court and not the witness is the judge.*"

If the general manager of the corporation has the right, as is claimed, to finally determine when the papers in question were in his hands in Boston, whether they would incriminate the defendant, if produced in response to the notice, then any person or corporation, even a party to a suit on trial, may refuse to obey the order made in open Court to produce documentary evidence, upon the ground that he, the party, fears it would incriminate.

> "It is not for the witness to withhold the documents upon his mere assertion that they are not relevant or that they are privileged. The question of relevancy is never one for the witness to concern himself with, nor is the applicability of a privilege to be left to his decision. It is his duty to bring what the Court requires, and the Court to determine by inspection the relevancy or privilege."
>
> Wigmore on Evidence, 2200, 2210.

It is doubtful whether a corporation can claim the privilege.

In

Hale v. *Henkel*, 201 U. S. 43,

this Court says:

> "A corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the state and the limitations of its charter. While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges."

In

United States v. *Hunter*, 15 Fed. Rep. 715,

it is held:

> "It is the duty of a witness in response to the *subpœna duces tecum*, to appear before the grand jury and produce the telegrams described in the subpœna, and if he has doubts as to whether or not he should produce any telegrams called for, he may submit it to the inspection of the Court which may decide on the question of its production."

And in

Hale v. *Henkel*, *supra*,

this Court says:

> "We think it quite clear that the search and seizure clause of the Fourth Amendment was not intended to interfere with the power of Congress to compel through a *subpœna duces tecum*, the production upon a trial in Court, of documentary evidence. As remarked in *Summers* v. *Moseley*, 2 C. M. & R. 477, it would be 'utterly impossible to carry on the administration of justice' without this writ."

The record shows that the only evidence before the Court below as to what the papers in question contained, is the testimony of Witness Mantor, the Manager of the Company. This witness testifies, as found by the trial Court (Page 19 of Record) that the papers in question were of no consequence to the Company and would be of no consequence to anybody; that there was nothing in them that involved the Company in anything irregular or illegal: that there was no irregularity. The answer (Page 17 of Record) does not set forth that

as a matter of fact there was anything in the papers which would incriminate.

All the allegation anywhere that the papers contained incriminating matter is in the affidavit filed in the trial Court by the general counsel for the plaintiff in error (Page 17 of Record) that such was the case, but according to the facts as found by the Court (Page 19 of Record) it is difficult to see how the general counsel could know anything about it. They were, says the Manager, destroyed because of their innocence rather than because of evidence of guilt, and he, not the general counsel, knew what they contained.

The requirement of the production of books and papers did not compel the company to incriminate itself. The case of *Adams* v. *New York*, 192 U. S. 597, is authority to that end.

The Law Does Not Take Private Property for Public Use Without Compensation

Requiring a person or a corporation to furnish without tender of expenses, such evidence or testimony as he is capable of furnishing, a recognized duty of every citizen, to the State, is not a taking of his property without compensation. It is doubtful if a witness is entitled to any fee in a criminal cause in the absence of express statutory provision for it. It is a service which the State has a right to require of its citizens. We call attention to the discussion of witness fees in Wigmore on Evidence, secs. 2201, 2202, and cases cited in last note to section 2201. It is true a witness who is unable by reason of his extreme provety to attend as commanded, cannot be held guilty of contempt for such failure.

Ency. Plead. & Prac., Vol. 22, p. 1340.

The statute in question in this case makes no provision or

exception one way or the other as to fees or compensation. The law requires the service to be performed. If for the State, it must be with or without fees or pay therefor, as the statute provides. If for a private party or in a civil cause, it may be the corporation wolud be entitled to and could demand upou production of the documentary evidence that it be paid a reasonable compensation, before its delivery. But that would be a question for the Court. It is not a violation of a Constitutional right.

It might be said that to take the time of a busy man to attend as a juror in a Justice Court for fifty cents, when he could earn many times that sum in his own business or work, is taking his property without just compensation. Service of that sort and like that required by the statute in question here, is not measured in that way. Our own statute, Vermont Statutes, sec. 1252, excepts criminal cases (and, therefore, grand jury proceedings) from the requirement of tender in advance of witness fee.

If the scope of the Fourteenth Amendment be to require the payment or tender of the actual value of the time spent or service rendered in the production of evidence or testimony before Courts of Law, then the practice which has up to this time obtained in both State and Federal jurisdiction is all wrong. If the corporation is entitled as a matter of constitutional right to a fee or compensation for such a service as is required by a notice under this act, it is entitled to recover from the State or from any individual for whom such service is rendered, a just and fair compensation therefor. A tender in advance is, by all authority, not required.

It was said by the Supreme Court of Wisconsin, *West* v. *State*, 1 Wis. 206, "but in no sense can the requisition upon the citizen of his attendance upon court be considered as taking of private property for public use within the meaning of the Constitution. The object of that provision in fundamental law was to protect citizens from the grasping demands

of the government, not to absolve him from any of those personal duties which every good citizen owes to his country." There are numerous civic duties like apprehending felons, helping to suppress riots, joining the *posse comitatus* and likewise military duty like serving in the military guard, which the government requires of all citizens. The law could not be administered were the State or private parties required to determine and pay in the first instance the full damage suffered by a witness in being compelled to attend and testify or bring his books and papers.

Israel v. *State*, 8 Ind. 467.
Buchanan v. *State*, 59 Ind. 1.

DUE PROCESS OF LAW

The statute here in question applies to all corporations, and operates to place the corporation, the artifical person, on an exact level with the natural person. The latter may be required to attend upon Court and produce the books and papers in his possession so far as they relate to the subject of inquiry. The law asks of the corporation nothing more than it asks of every citizen of the State. It is undertaken by this proceeding to administer no other punishment upon the plaintiff in error than could be imposed, under common-law procedure, upon any individual who was likewise in contempt. The full measure of *due process of law* is given to the plaintiff in error by this statute and by these proceedings.

Law in its regular course of administration through courts is due process, and when secured by a law of the State, the constitutional requirement is satisfied, and that due process is so secured by laws operating on all alike.

Leeper v. *Texas*, 139 U. S. 462.
Kent's Commentaries, Vol. 2, p. 13.
Marchant v. *Railroad Co.*, 153 U. S. 390.

> "The prescribing of different modes of procedure . . . leaving untouched all the substantial protections with which the existing law surrounds the person . . . are not considered within the constitutional prohibition."
>
> *Duncan* v. *Missouri*, 152 U. S. 377.

What is due process of law in the States is regulated by the law of the State.

> *Walker* v. *Sauvinet*, 92 U. S. 90.
> *Hayes* v. *Missouri*, 120 U. S. 71.
> *Missouri* v. *Lewis*, 101 U. S. 22, 31.
> *Brown* v. *New Jersey*, 175 U. S. 175.

Forms of procedure in the State court are not controlled by the Fourteenth Amendment, provided that the nominal rights secured by the amendment are not denied.

> *Ex parte Reggel*, 114 U. S. 642.
> *Railroad Co.* v. *Chicago*, 166 U. S. 226.

Due process of law within the meaning of the Fourteenth Amendment is secured if the laws operate on all alike and do not subject the individual to the arbitrary exercise of the powers of government.

> *Giozza* v. *Tiernan*, 148 U. S. 657.
> *Railroad Co.* v. *Mackey*, 127 U. S. 205.
> *Railroad Co.* v. *Herrick*, 127 U. S. 210.
> *Ballard* v. *Hunter*, 204 U. S. 241.

We call attention to the definition given by Mr. Justice FIELD in

> *Turpin* v. *Lemon*, 187 U. S. 51, 58.
> *State* v. *Cadigan*, 73 Vt. 252.

See also *Hooker* v. *Los Angeles*, 188 U. S. 314.
Petroleum Co. v. *West Virginia*, 203 U. S. 191,
and *Reetz* v. *Michigan*, 188 U. S. 505.

The latter case holding that an appeal is not necessary to a due process of law.

> "A person who is fined far contempt of Court is not deprived of his property without due process of law, if the proceedings were regular, although he was not tried by the jury."
>
> Black's Constitutional Law, 490.

And the same work at page 492:

> "When contempt is constructive, the proper course is to issue attachment to bring the respondent into Court to show cause, etc. . . . But he cannot claim a trial by jury: the Court itself determines the question of contempt punishment."
>
> *State* v. *Matthews*, 37 N. H. 450.
> *State* v. *Doty*, 32 N. J. Law, 403.

THE PUNISHMENT

A corporation may be punished for contempt as well as an individual person.

People v. *Railroad Co.*, 20 How. Pr. (N. Y.) 358.

Where a foreign corporation is doing business in another State, it is proper to punish a contempt by a fine as well against

the corporation itself as the subordinate agents found within its jurisdiction.

United States v. *Railroad Co.*, 6 Fed. Rep. 237.

> "Although a corporation cannot be hung, there is no reason why it might not be fined for the same act which would subject an individual to the gallows."

1 Bish. Cr. L. (6th ed.), sec. 423.

It is proper to provide by statute the manner of punishment for contempt.

The United States statutes, act of March 2, 1831, chapter 99, and prior acts all prescribe modes of punishment for contempt.

See also Revised Statutes United States, secs. 725, 5399.
2 Bish. Cr. L., sec. 267.
Ex parte Robinson, 19 Wall. 505.

And the statute may provide for execution to issue.

People v. *Boyle*, 64 Cal. 156.

It is not required that the statute provide for a tender in advance of indemnity for expenses.

Wigmore on Evidence, 2201.

It may be claimed by the respondent that the State has no power to compel the production of papers which are in another jurisdiction. If that contention is made, we suggest that the process runs against the person, and it requires the production of only such documentary evidence as is in the possession or control of the person (to wit, the corporation) who *is* within the jurisdiction of the Court.

The Law may be Upheld as Within the Reserved Power of the State to Alter, Amend or Repeal the Charters of Corporations

The general law of Vermont provides that "every act creating, continuing, altering or renewing any corporation . . . may be altered, amended or repealed whenever the public good shall require such alteration, amendment or repeal."

Vermont Statutes, sec. 3686.

It is long settled that a State may impose such terms as it sees fit upon a foreign corporation.

The statute in question may fairly be construed as an amendment to the charter of either a domestic or foreign corporation, and a condition precedent to the further exercise of its corporate functions within this State by every foreign corporation.

This Court held in

Railway Co. v. *Paul*, 173 U. S. 404,

that a statute of Arkansas providing for the protection of servants and employees in the matter of payment of wages when discharged from service, is not in conflict with the provisions of the Fourteenth Amendment, and says:

> "Corporations are the creations of the State, endowed with such faculties as the State bestows and subject to such conditions as the State imposes, and if the power to modify their charter is reserved, that reservation is a part of the contract, and no change within the legitimate exercise of the power can be said to impair its obligation."
>
> *Holden* v. *Hardy*, 169 U. S. 366.

And this Court has in several cases held that statutes abolishing or modifying the common law of fellow servants in respect to railroad corporations, not affecting other corporations, is constitutional.

Railway Co. v. *Mackey*, 127 U. S. 205.
Iron Co. v. *Kline*, 199 U. S. 593.
Willis v. *Railroad Co.*, 175 U. S. 348.

But the operation of the law here in question is

Not An Unjust And Arbitrary Classification

It applies to all corporations, and applies to corporations because the artificial person cannot be reached by the common-law process. It is "based upon reasonable grounds . . . and is not a mere arbitrary selection."

Railway Co. v. *Ellis*, 165 U. S. 150.

The natural person within the borders of the State could be reached by a *subpœna duces tecum*. The artificial person could not. Such was the "old law."

The "mischief" was that the natural person and the artificial person were not equally within the reach of the hand of the government. This law is the "remedy." It puts the natural and the artificial creature on the same plane.

The illustration in the brief of the Plaintiff in Error, comparing a Massachusetts corporation doing business in Vermont, and a Massachusetts partnership or individual citizen doing business in Vermont, each through resident agents, does not show the true situation. The Massachusetts corporation is *present* in Vermont. It simply sends its books and papers into Massachusetts. If the individual citizen of the latter commonwealth was *present* in Vermont, and sent its books and papers into Massachusetts, he could by *subpœna duces tecum*, so long as he remained *present* in Vermont, be reached by the process of our Courts.

Respectfully submitted,

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